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In The
Supreme Court of the United States

CHARLES MAYO ACREE, TWYMAN K, APPLEBY,BRENDA BARTLEY, CHARLES BENNETT, DONALD BENNETT, LOUIS K. BENNETT, JR., AUSTIN BINGHAM, CARL BROWN, DONALD BRUTON, WILLIAM F. BURKS, JR, ISAAC BUTLER, JOYCE CAPPS, EDWARD CLAYWELL, NYMAN CLAYWELL, CHARLES COFFEY, BOBBY DECKARD, EVA ROSE DECKARD, KENNETH DOUGLAS, CHARLES EATON, ROBERT EMBERTON, JERRY FRANCIS, TED GARMON, WILLIAM GARRETT, CURTIS GIBSON, CARLOS GREEN, DANIEL HARPER, WILLIAM HOUCHENS, ROBERT JONES, RICHARD LILE, MAXIE MARTIN, WILLIAM MARTIN, THOMAS MATTHEWS, JOYCE MORGAN, MICKEL MUSE, RANDAL PACE, NOEL PAGE, GENE PEDIGO, CHARLES RICH, CLEVELAN ROACH, LYNDAL RUTLEDGE, RAYMOND SHAW, JR., SELBY SHIRLEY, JACK SHOOPMAN, NILE SMITH, JOE SPEAR, DOUGLAS STEEN, JACKIE SULLIVAN, DAVID TAYLOR, and BILLY YOUNG,

Petitioners,

v.

TYSON BEARING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Upon its "turnkey" purchase of a factory with 226 active hourly employees, the respondent instituted and enforced a policy whereby it paid 79 of its hourly workers $3.00 per hour less than all but a very few (six) of their co-workers.

The policy described the lower-paid workers as "retiree-applicants." They were employees who had elected to receive a pension benefit from the previous owner of the factory that respondent began operating on June 14, 1999. In order to be "retiree-applicants," employees had to be 55 years of age or have 30 years of service with the plant's previous owner.

Petitioners are a large group of these "retiree-applicants." They believe that the policy whereby respondent has paid them $3.00 per hour less than their co-workers since June 14, 1999, discriminates against them because of their age 40 years and over, in violation of the Kentucky equivalent of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623, et. seq.

The central question in this case is this:

> Is a policy that by its express terms applies only to the disadvantage of employees age 46 and older (Kentucky law has long prohibited factory employment for those under age 16) per se discriminatory against those employees because of their age?

Some subsidiary questions are:

> Are there any special reasons why facially discriminatory policies are acceptable to the disadvantage of older workers, as opposed to members of other protected groups?

QUESTIONS PRESENTED FOR REVIEW – Continued

If facially discriminatory policies are ever acceptable generally, what defenses or justifications make make them acceptable?

Because this case was tried to a jury, there are also some procedural questions that the Court may want to consider:

Even if a facially discriminatory policy is not per se discriminatory, should a jury be permitted to find that it is discriminatory as a matter of fact because of its facially discriminatory nature?

Are age discrimination plaintiffs who proved that an employer's policy had a disparate impact upon them, to their disadvantage, at least entitled to a trial upon that theory where:

1. the court of appeals had affirmed a summary judgment against them upon the basis that disparate impact may never be a viable theory of recovery in an age discrimination case; and

2. the Supreme Court pronounced to the contrary in an opinion issued during the pendency of the plaintiff's appeal; and

3. the plaintiffs immediately brought the relevant opinion of the Supreme Court to the attention of the court of appeals?

Are age discrimination plaintiffs entitled to a new trial where the district court permitted an employer who enforced a discriminatory policy to defend upon the basis that the institution of the policy was the idea of the plaintiff's union, and:

QUESTIONS PRESENTED FOR REVIEW – Continued

1. The district court had properly ruled, prior to trial, that the employer was solely responsible for the discriminatory policy, and could not even prosecute a third party complaint against the union; and

2. The plaintiffs protested the employer's reliance upon this finger-pointing defense at every available opportunity?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The district court's opinion (per Russell, D.J.) denying the respondent's motion for summary judgment and the petitioners' cross motion for summary judgment appears at pp. 31a to 43a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 44a.

The district court's opinion reconsidering its denial of respondent's motion for summary judgment upon petitioners' disparate impact claim and granting the same appears at pp. 45a to 57a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 58a.

The district court's judgment upon a jury verdict for the respondent appears at p. 59a of the Appendix to this petition.

The district court's opinion denying petitioner's motion for judgment as a matter of law upon liability and alternative motion for a new trial appears at pp. 60a to 63a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 64a.

The court of appeals' opinion (per Sargus, D.J., sitting by designation, joined by Boggs, C.J. and Gilman, J.) appears at pp. 1a to 30a of the Appendix to this Petition.

The court of appeals' order denying rehearing and rehearing en banc appears at p. 67a of the Appendix to this petition.

The court of appeals' order dismissing respondent's cross-appeal appears at pp. 65a-66a of the Appendix to this petition.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion in this case on February 11, 2005, and denied rehearing and rehearing en banc on April 25, 2005. Petitioners invoke this court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

29 United States Code §623(a)(1) and (2)

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age [40 years and older];

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age [40 years and older].

29 United States Code §623(f)(1)

[An employer may] . . . take an action otherwise prohibited . . . where the differentiation is based upon reasonable factors other than age.

Kentucky Revised Statutes §344.020(1)(a)

The general purposes of this chapter are:

To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended (78 Stat. 241). Title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81), the Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), the Americans with Disabilities Act of 1990 (P.L. 101-336), and the Civil Rights Act of 1991 as amended (P.L. 102-166, amended by P.L. 102-392);

Kentucky Revised Statutes §344.040(1) and (2)

It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is a qualified individual with a disability, or

because the individual is a smoker or non-smoker, as long as the person complies with any workplace policy concerning smoking.

STATEMENT OF THE CASE

Substantive Facts

Effective June 11, 1999, Roller Bearing Corporation of America purchased the tapered bearing division of SKF, USA, Inc. located in Glasgow, Kentucky. Roller Bearing Corporation then invested the operation of the facility to its newly created subsidiary corporation, Tyson Bearing Company, Inc., which is the respondent to this petition.

Tyson's first day of operations at the Glasgow facility was June 14, 1999. At that time, almost each and every former hourly employee of SKF, USA, Inc.'s tapered roller bearing corporation became an active employee of Tyson. There were 226 of them. Another three former SKF employees were on medical leave and 32 were on lay-off status (Appendix for the Court of Appeals, pp. 197-204).

Both SKF and Tyson were parties to a collective bargaining agreement with Local 7641 of the United Steelworkers of America, AFL-CIO. SKF and the union had negotiated a three-year contract early in 1999. Tyson's parent company, Roller Bearing Corporation, agreed to honor this contract and agreed to an almost identical version of it with Local 7641 within several months of SKF's agreement with the Union.

Both contracts set forth a scale of wages from $13.40 to $15.24 per hour. The only exception to this wage scale in

the union contract with SKF was for employees hired after March 31, 1996. These employees received $3 per hour less than others at the plant under Article XIV, Section 3 of the contracts to which both SKF and Tyson were signatories (Appendix for the Court of Appeals, p. 204; Opinion of the Court of Appeals, Appendix to this Brief, hereinafter APX, p. 4, note 3). There were only six such employees at Tyson as of June 14, 1999.

Before it took over operations of the Glasgow tapered roller bearing facility, Tyson "negotiated" a major wage concession from the local union. This concession was reflected in a "Memorandum of Agreement" which was appended to the labor agreement between Tyson and Local 7641.

The "Memorandum of Agreement" created a class of employees at Tyson described as "retiree-applicants." All of the members of this class were made subject to Article XIV, Section 3 of the labor agreement. Accordingly, they were permitted to earn only $10.40 to $12.24 per hour, which was $3.00 less than all but six of their co-workers. In addition, their annual vacations were reduced from a maximum of four weeks to only two weeks (Opinion of the Court of Appeals, APX, pp. 3-5).

There were 79 "retiree-applicants" and 147 other hourly employees on Tyson's hourly employee roster as of June 14, 1999. Again, all but six of the 147 were getting "full wages;" the six true "new hires" and the 79 "retiree-applicants," on the other hand were earning $3.00 per hour less than full wages (Appendix for the Court of Appeals, pp. 197-204).

Of course, all 79 "retiree-applicants," along with the 141 Tyson employees getting full wages had been hired by

SKF before March 31, 1996. Just as obviously, each and every one of Tyson's hourly employees had been newly hired by Tyson on June 11 (or June 14), 1999.

The "retiree-applicants" were individuals who began receiving a pension from SKF USA, Inc. because of their years of service for SKF as of the date of its sale of the Glasgow tapered roller bearing facility to Tyson. As specifically set forth in the "Memorandum of Agreement," this meant that they had been SKF employees for either 30 years or that they had attained the age of 55 years and had been SKF employees for ten years (Opinion of the Court of Appeals, APX, pp. 3-4).

A few long-term SKF employees elected not to take their 30+/55 pension benefit effective as of the date of the sale. However, the Memorandum of Agreement provided that when these individuals decided to take their SKF pension benefit, their Tyson pay would be cut $3.00 per hour. Three such employees were identified at the trial of this case (Appendix for the Court of Appeals, p. 204).

As of June 14, 1999, the average age of the 79 "retiree-applicants," was 56.26 years. The youngest was 49 years of age (Appendix for the Court of Appeals, pp. 197-204).

The average age of the 141 non "new hire" Tyson employees as of that date was 41.67 years. 38 of these were under the age of 40, as were five of the six true "new hires," whose ages were not included in figuring the average age of the 141 non "new hire" employees (*id.*).

More significantly, the "retiree applicant" policy created by the "Memorandum of Agreement" between Tyson and the hourly workers' union, and enforced by Tyson, *discriminated on its face* against a group of employees (the

"retiree applicants") who, by the express terms of the policy, had to be over the age of 46 years.

This is because since 1948 the Commonwealth of Kentucky has prohibited manufacturing employers from hiring employees under the age of 16 years, Kentucky Revised Statutes, (KRS) §339.230(2). None of the 261 employees on Tyson's roster as of June 14, 1999, had begun working for its predecessor, SKF USA, Inc., before attaining the age of 18 years (Appendix for the Court of Appeals, pp. 197-204).

* * *

The Opinion of the court of appeals, at p. 4, footnote 4, creates the impression that the "retiree-applicants" received benefits in return for Tyson's cutting their pay $3.00 per hour and reducing their vacation entitlement (APX, pp. 4-5, note 4).

This is not so. The benefits numbered 1, 2, 3, 4, 6, and 8 in the footnote were accorded to each and every former SKF hourly employee who went to work for Tyson. Number 5 reflects Tyson's cutting the "retiree-applicants" vacation entitlement. Number 7 reflects their reduced wages and an opportunity that Tyson did afford them to earn back this reduction. Number 6 was created about a year after the sale took effect when Tyson became aware that a large number of the "retiree-applicants" were not content enough with their retiree medical benefits from SKF to voluntarily "opt out" of Tyson's medical benefit plan, but this new benefit was still available to all Tyson employees.

It is true that Tyson had threatened to deprive the "retiree-applicants" of most of these benefits (Appendix of

the Court of Appeals, pp. 385, 389-390). Had it done so, of course, such action would simply have exacerbated Tyson's adverse treatment of the "retiree-applicants" beyond its cutting their pay and vacation benefit.

Tyson's other "negotiating" ploy was an initial "offer" to the Union of an across the board wage reduction for all employees of $5.00 per hour. Although the "retiree-applicants" made up only slightly more than one third (79 of 226) of Tyson's initial work force. Tyson CEO Mike Gostomski, insisted that he could achieve the savings that he did only by cutting the pay of the "retiree-applicants" $3.00 per hour *or* the pay of *all* hourly workers by $4.68 per hour (Appendix of the Court of Appeals, pp. 267-268). The fact that simple mathematics places the latter figure just slightly above $1.00 per hour did not sway Gostomski from his insistence on the $4.68 figure.

Procedural Facts

Petitioners, Charles Mayo Acree and 49 of his fellow "retiree-applicant" employees of the respondent, Tyson, filed the lawsuit that gave rise to this petition in the Barren (County) Circuit Court of the Commonwealth of Kentucky on August 29, 2002 (Opinion of the Court of Appeals, APX, p. 6). Petitioners alleged that Tyson's enforcement of the provisions of the "Memorandum of Agreement" constituted illegal age discrimination against them in violation of KRS §334.040(1) and (2). They advanced both disparate treatment and disparate impact theories of recovery (Opinion of the Court of Appeals, APX, p. 6).

On October 5, 2002, Tyson removed the lawsuit to the United States District Court for Western Kentucky at

Bowling Green pursuant to 28 United States Code §1332, upon the basis of the diversity of citizenship of the parties (Appendix for the Court of Appeals, pp. 21-22, Opinion of the Court of Appeals, APX, p. 6).

On September 3, 2002, Tyson moved for summary judgment. Petitioners responded and filed a cross-motion for the same relief, relying upon the facially discriminatory nature of the $3.00 per hour pay cut mandated by the "Memorandum of Agreement" (Opinion of the Court of Appeals, APX, p. 6).

In these memoranda, as well as all of the other memoranda, briefs, and opinions of the parties and the courts below, the parties, and the courts, relied upon the jurisprudence surrounding the federal equivalent of the Kentucky Civil Rights Act's prohibition of age discrimination. This is 29 United States Code (U.S.C.) §623, et seq., known as the ADEA (Opinion of the Court of Appeals, APX, pp. 11-12). The Kentucky Civil Rights Act itself authorizes such reliance.[1]

The district court denied both Tyson's motion for summary judgment and the petitioners' cross-motion for summary judgment on January 2, 2003 (Order of the District Court, 1-2-03; APX, p. 44).

Both parties then filed motions for reconsideration. On February 7, 2003, the district court denied petitioners' motion but granted respondent's motion:

---

[1] The liability provisions of the act are identical to the ADEA and Title VII, except that the Kentucky Civil Rights Act has no "reasonable factor other than age" provision. KRS 344.040(1) and (2), KRS 344.020(1)(a), 29 U.S.C. §623(a)(1) and (2) and §623(f)(1).

> . . . to the extent that it argued that the Kentucky Civil Rights Act does not recognize an age-biased discrimination claim under a disparate impact theory of recovery (Opinion of the District Court, 2-7-03, APX, pp. 47-54; Opinion of the Court of Appeals, APX, p. 7)

Again, the district court's holding on this issue was based entirely upon its analysis of the then-existing cases from the federal courts interpreting the ADEA (Opinion of the District Court, 12-30-02, APX, p. 37, note 3).

What was left of the case was then tried to a jury. Petitioners submitted proposed jury instructions incorporating three theories of liability:

(1) disparate impact;

(2) disparate treatment that focused upon a *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), "pretext" analysis, and;

(3) disparate treatment based upon the facially discriminatory nature of the "retiree-applicant" policy; (Opinion of the Court of Appeals, APX, p. 7).

The district court refused to give either a disparate impact or "facial discrimination" instruction. Instead, it gave the following liability instruction to the jury:

> In order to prevail on their claim of age discrimination, the Plaintiffs must prove the following two essential elements by a preponderance of the evidence:
>
> (1) The Plaintiffs were forty years of age or older; and

(2) Plaintiffs' age as a motivating factor in the Defendant's decision to enter into the Memorandum of Agreement of June 10, 1999 that reduced Plaintiffs' compensation and benefits.

The term "motivating factor" means a consideration that moved Defendant Tyson Bearing Co. toward its decision. A consideration can be a "motivating factor" without being the only motivation for a particular decision. However, it must have been a factor that actually led to the decision.

The mere fact that Plaintiffs are 40 years of age or older and received reduced pay and benefits is not sufficient, in and of itself, to establish Plaintiffs' claims (Opinion of the Court of Appeals, APX, pp. 7-8).

The jury returned a verdict for Tyson. Petitioners' then made a post-trial motion renewing the motion for judgment as a matter of law that they had made at the close of evidence during the trial.

In the alternative, petitioners requested a new trial (Opinion of the Court of Appeals, APX, p. 8; Appendix for the Court of Appeals, p. 448).

On June 9, 2003, the district court denied both of these motions (Opinion of the Court of Appeals, APX, p. 8; Opinion of the District Court, 6-5-03, pp. 60-64).

The petitioners then appealed to the United States Court of Appeals for the Sixth Circuit, which had jurisdiction over the appeal pursuant to 28 United States Code §1291.

Petitioners appealed the district court's granting of the respondent's motion for summary judgment upon their disparate impact theory, its denial of their motions for summary judgment, judgment as a matter of law (directed verdict and notwithstanding the verdict), and their alternative motion for a new trial. In addition, they appealed the district court's failure to give certain jury instructions incorporating their theories of recovery for age discrimination (Opinion of the Court of Appeals, APX, pp. 8-9).

The court of appeals correctly held that the only aspect of the district court's orders relating to the parties' various motions for summary judgment that was appealable was its granting of the respondent's motion upon the petitioners' disparate impact claim (Opinion of the Court of Appeals, APX, p. 9). Otherwise, the court reviewed the district court's denial of the petitioners' motions for judgment as a matter of law and alternative motion for a new trial (*id.*).

The court of appeals affirmed the actions of the district court in all respects. It rejected the following arguments of petitioners in support of their motion for judgment as a matter of law upon liability:

> 1. that the respondent's enforcement of the "retiree-applicant" policy was discriminatory per se because it applied, on its face, only to individuals age 46 and over; and
>
> 2. that the respondent's stated reason for adopting and enforcing the "retiree-applicant" policy, which was to save money so that the business would be profitable, was a pretext for age discrimination as a matter of law because the policy had the effect of adversely affecting only employees over the age of 40 years.

The court of appeals also rejected the following arguments of petitioners in support of their motion for a new trial:

> 1. that the district court refused to charge the jury that it could find, as a matter of fact, that the respondent's adopting and enforcing of the "retiree-applicant" policy discriminated against the petitioners because of its facially discriminatory nature; and
>
> 2. that the district court should not have dismissed the petitioners' theory of disparate impact and the theory should have been presented to the jury, and;
>
> 3. that the district court should have admonished or charged the jury that the respondent could not defend against the petitioners' claims by seeking to blame the adoption and enforcement of the "retiree-applicant" policy upon local Union 7461 of the United Steelworkers Union, and the respondent's attorney was wrongly permitted to present this "defense" to the jury; and
>
> 4. that the district court should have prohibited the respondent's spokesman from testifying that the "retiree-applicant" policy was the Union's idea despite the court's pre-trial ruling that respondent was completely responsible for adopting and enforcing the policy as a matter of law.

Finally, the court of appeals rejected the petitioners' argument that they were entitled to summary judgment upon the issue of liability under their disparate impact theory of recovery.

Petitioners then filed a petition for panel or en banc rehearing.

While this petition was pending, this court decided the case of *Smith v. City of Jackson, Mississippi,* 544 U.S. ___, 125 S.Ct. 1536 (2005), on March 30, 2005. Petitioners immediately brought this decision to the attention of the court of appeals, pursuant to FRAP 28(j) (APX, p. 68).

On April 25, 2005, the court of appeals denied the petitioner's petition for panel or en banc rehearing, without any opinion (APX, p. 67).

ARGUMENT

The court should grant this petition in order to vindicate one of the fundamental goals of the equal employment opportunity laws: the eradication of overt, formal, facial discrimination in employment.

The anti-discrimination laws were one of our "highest priorities" when they were enacted in the 1960's, *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). If allowed to stand, the opinions of the courts below undermine this priority and the employment discrimination laws themselves by denying that a policy overtly and facially discriminatory toward workers age 40 and over.

> . . . will, in every instance and without more entitle an ADEA claimant to judgment as a matter of law (Opinion of the Court of Appeals, APX, pp. 14-15).

This is an issue of the greatest national importance. If the opinion of the court of appeals is not reversed, every employer within the Sixth Circuit will be empowered to create a two-tiered wage scale for the many older workers

who receive pensions from previous employers or the government, in the form of social security benefits.

Meanwhile, ethical employers will be faced with the dilemma of doing what the law clearly commands and facing a competitive disadvantage from employers who would rely upon the opinion of the court of appeals to cut their labor costs.

It matters not that the opinion of the court of appeals is "Not Recommended for Full Text Publication." The United States Court of Appeals For The Sixth Circuit permits the citation of unpublished opinions, even of state court unpublished opinions from a jurisdiction which itself has a rule prohibiting this practice! *Managed Health Care Associates, Inc. v. Kelton,* 209 F.3d 923 (6th Cir. 2000).

Nor is it significant that this case is being prosecuted under state law, and not the ADEA. The states and the national government are partners in battling employment discrimination, see *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 48 (1974). Furthermore, the Kentucky Civil Rights Act itself specifically first states as one of its purposes:

> To provide for execution within the state of the polices embodied in the Federal Civil rights Act of 1964 as amended (78 Stat. 241). Title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81), the Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), the Americans with Disabilities Act of 1990 (P.L. 101-336), and the Civil Rights Act of 1991 as amended (P.L. 102-166, amended by P.L. 102-392);

KRS 344.020(1)(a). The parties and the courts below quite properly relied explicitly and exclusively upon cases from federal courts interpreting Title VII and the ADEA, as there are no Kentucky cases interpreting the Kentucky Civil Rights Act on the issues at bar (Opinion of the Court of Appeals, APX, pp. 11-12).

Additionally, the liability provisions of the Kentucky Civil Rights Act and the ADEA are identical, except for the former's inclusion of age with other protected categories and its lack of the "reasonable factors other than age" provision of the ADEA (*id.*, APX, pp. 11-12).

In short, the opinion of the court of appeals in this case, in effect, has precisely the same precedential value as though it were: 1) published in the official reporters; and 2) litigated under the ADEA.

Petitioners believed, in initiating this litigation, that they were entitled to rely upon a settled rule of law that employers may never rely upon a policy that discriminates against older workers on its face. They believed that any opinions to the contrary would conflict with the decision of this court in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993).

Perhaps they were wrong. Perhaps there are, or should be, special legal principles governing facially discriminatory policies that disadvantage older workers so that such policies are not per se discriminatory. If so, this is obviously an important question of federal law that has not been, but should be settled by this court.

Either way, this case clearly falls within the parameters of one of the chief reasons upon which this court relies to grant a petition such as this as that reason is set forth at Rules of the Supreme Court 10(c).

We should now examine the law on this important issue in some detail.

* * *

One fortunate result of the modern civil rights laws is a decades old dearth of overt employment discrimination.

Indeed, most employers simply abandoned or discontinued such discrimination upon the enactment of the civil rights statutes during the 1960's. This process was described in some of the earlier cases brought under these laws, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 428 (1971), and *United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 983 (5th Cir. 1969).

All of the laws against employment discrimination were designed quite specifically to achieve this very result: the elimination of all overt acts, policies, tests, and procedures that were discriminatory, *Griggs, supra,* 401 U.S. at 431. This includes the Age Discrimination in Employment Act (ADEA). As this court said in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 611 (1993), an employer has practiced age discrimination upon any occasion when it:

> . . . relies upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait [age 40 and over].

That is, of course, precisely what the respondent has done in this case. It has relied upon a formal facially discriminatory policy requiring adverse treatment of a group of its employees, all of whom had to be over the age

of 46 years to be covered by the policy. respondent, Tyson Bearing Company, Inc., has, therefore, practiced age discrimination against these employees, among whom are the petitioners.

Petitioners argued again and again to the courts below that this should be the end of the discussion; that they were entitled to judgment as a matter if law upon liability because the "retiree-applicant" policy was a discriminatory policy; that they needed prove nothing beyond the policy itself in order to prevail.

The courts below and the respondent disagreed. At least their disagreement had the effect of testing the petitioners' theory of the case. Although the courts below refused to acknowledge it, the theory passed the test.

Petitioners believe that there are no defenses to a facially discriminatory policy or any justifications for such a policy. It does not matter that the policy does not include each and every individual within the affected protected class within its provisions; *Sproggin v. United Airlines, Inc.*, 444 F.2d 1194, 1998 (7th Cir. 1971); indeed, in *Trans World Airlines v. Thurston,* 469 U.S. 111 (1985), this court voided an age-biased policy that applied to only 59-year-old pilots!

It is also no defense that a third party "required" suggested, or was complicit in the establishment and even the enforcement of the discriminatory policy. Thus in *Palmer v. General Mills, Inc.*, 513 F.2d 1040, 1043 (6th Cir. 1979), the court struck down an employer's segregation of its workforce by sex despite the existence of a state protective statute that required such segregation. Thus in this case, the district court properly dismissed the respondent's third party complaint against the petitioners' Union so that respondent could not "point the finger of blame" for

its enforcement of the "retiree-applicant" policy toward the Union (Memorandum Opinion of the District Court, 1-17-02; Appendix for the Court of Appeals, pp. 96-106). The district court correctly held that respondent was completely responsible for the retiree-applicant policy because it and it alone, " . . . undertook to implement the agreement's terms," and it in fact has done so (*id.*), despite the Union's alleged complicity in the existence of the policy.[2]

Furthermore, there is no requirement that a plaintiff complaining about adverse treatment because of a facially discriminatory policy prove that his employer harbored any discriminatory animus or specific intent to discriminate against the plaintiff when the employer enacted or enforced the policy. In *Thurston, id.*, 469 U.S. at 623, this court voided a TWA policy that facially discriminated against 59-year-old pilots even though the employer had instituted the policy in the good faith belief that the policy was not discriminatory.

In this case, the respondent and the court of appeals argued that the "retiree-applicant" policy was justified because respondent needed to save money to stay in business and because the policy was based upon the "retiree-applicants" pension status (Opinion of the Court of Appeals, APX, pp. 17-18).

While there is nothing wrong with an employer's wanting to save money, it can only do so in a non-discriminatory

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[2] This Memorandum Opinion and the Order dismissing Tyson's third-party complaint against the Union is the law of the case because Tyson did not perfect its appeal of the district court's dismissal of the third-party complaint (Order of the Court of Appeals, 12-15-03; APX, pp. 65-66).

manner, *McDonnell-Douglas Corporation v. Green,* 411 U.S. 797, 805 (1973). *Thurston, supra,* 469 U.S. at 122; citing *Hishon v. King and Spalding,* 467 U.S. 69, 75 (1984). As a reason or justification for its action in this case, therefore, respondent's need to save money is inadequate as a matter of law.

The argument that the "retiree-applicant" policy was justified because it was based upon the petitioner's pension status is also unavailing.

It is true that *Hazen Paper, supra,* 507 U.S. at 612-614, did establish that discrimination based upon pension status does not prove age discrimination where the particular form of pension status upon which the employer relies is, " . . . analytically distinct from age," *General Dynamic Land Systems v. Cline,* ___ U.S. ___, 124 S.Ct. 1236, 1249 (2005).

In this case, certainly, petitioners' pension status is *not* analytically distinct from their age. It is analytically *identical* with their age, 46 years and over.

Because of the facially stated age-based parameters of the retiree-applicant policy, Tyson had to know of the absolute correlation between the pension and age factors set out in the policy. Consequently, petitioners' pension status was a "proxy" for their age in the retiree-applicant policy. Because of this, in turn, the retiree-applicant policy was discriminatory against the retiree-applicants because of their age over 40 years as a mater of law. This was a conclusion specifically recognized in the *Hazen Paper* case, *supra,* 507 U.S. at 613-614 (Opinion of the Court of Appeals, APX, p. 18).

Again, there are no valid defenses to, justifications of, or excuses for the respondent's retiree-applicant policy. No matter how you analyze the policy, it discriminated against the petitioners because of their age, 46 years and older, as a matter of law.

* * *

Petitioners have made these arguments at every stage of the proceedings in this case (Opinion of the District Court, 2-7-03; APX, p. 61; Opinion of the Court of Appeals; APX, pp. 13-14).

The district court did not even acknowledge these arguments until petitioners had presented them to the court for the third time, in their motion for post judgment relief (Opinion of the District Court, 2-7-03; APX, p. 61). That court rejected petitioners' argument that the "retiree-applicant" policy was discriminatory per se because to do so, " . . . would convert Plaintiffs' disparate treatment claim into one for disparate impact." This would never do, according to the court, as it had previously ruled that a disparate impact theory of recovery was never available to an age discrimination plaintiff (*id.*, APX, p. 61).

The court of appeals did acknowledge petitioners' arguments and their reliance upon the *Thurston* opinion (Opinion of the Court of Appeals; APX, pp. 13-15). The court denied, however, that *Thurston* established:

> . . . the unequivocal principle that an employer's facially discriminatory policy will in every instance and without more entitle an ADEA claimant to judgment as a matter of law (Opinion of the Court of Appeals, APX, pp. 14-15).

As a matter of semantics, this may be correct. But even if *Thurston* did not "establish" the principle at issue, it certainly relied upon it and affirmed its truth!

The court of appeals also opined that, " . . . case law following *Thurston* clarifies the standard of liability under the ADEA," (Opinion of the Court of Appeals, APX, p. 15).

The court pointed to three "post-*Thurston*" reasons why the petitioners' theory of the case must fail. They were:

1. A lack of evidence that age bias was at least a "motivating factor" in Tyson's enforcement of the retiree-applicant policy (Opinion of the Court of Appeals, APX, pp. 15-17).

2. The fact that the policy did not apply to Tyson employees who were eligible for an SKF pension, but elected to forego it (*id.*, APX, p. 15).

3. The fact that the retiree-applicant policy was based upon the pension status of the petitioners and their fellow retiree applicants (*id.*, APX, pp. 16-19).

The court of appeals also denied that the petitioners had shown "pretext" as a matter of law by their showing that Tyson's saving money by enforcing the policy was done in a discriminatory manner. Again, petitioners believe that the completely discriminatory effect of the policy undercut any notion that saving money in this case could be a legitimate non-discriminatory reason for enforcing the policy (*id.*, APX, pp. 21-23).

As we have seen, both of the courts below rejected out of hand any notion that the petitioners, as age discrimination plaintiffs, were entitled to rely upon any variation of a

disparate impact theory. Indeed, the court of appeals refused to reconsider its ruling on this issue even after the petitioners had brought the recent opinion of *Smith v. City of Jackson,* 544 U.S. ___, 125 S.Ct. 1536 (2005) to its attention on March 30, 2005 (APX, pp. 68-69).

The refusal of the courts below to entertain petitioners' claim under a disparate impact theory of recovery was just as wrong as their analysis of the other issues in this case. *Smith, id.*, indicates that disparate impact claims are cognizable under the ADEA. In this case of course, the retiree-applicant policy not only had a disparate impact upon those over age 40, its impact was *exclusive* to those in that age group. Even the district court acknowledged the probative nature of this fact, albeit only as a form of circumstantial proof of the petitioner's claim as analyzed under a traditional disparate treatment theory (Memorandum Opinion of the District Court, 1-2-03; APX, pp. 41-42, note 7). Furthermore, neither of the defenses available in typical disparate impact cases assist the respondent in this case.

There are two such defenses. One is "business necessity," *Griggs, supra,* 401 S.Ct. at 433. The other, available only under the federal age discrimination law, is that the challenged, " . . . differentiation is based upon reasonable factors other than age," 29 U.S.C. §623(f)(1). This defense *does not* exist under Kentucky law (Memorandum Opinion of the District Court, 2-7-03; APX, pp. 50-51).

Of course, it may be true that a company has a "business necessity" to save money and keep its operation going. However, it is just as true that it may not achieve this necessary goal upon the backs of one protected group. In this case, Tyson could have achieved the same savings

that it did from a $3.00 per hour wage cut from the "retiree-applicants," with an across-the-board wage cut of slightly more than $1.00 per hour (This petition, *infra,* p. 8).

This clearly establishes the disparate impact version of "pretext" as a matter of law, *Ward's Cove Packing Co., v. Antonio,* 490 U.S. 652, 660-661 (1989).

As to the "reasonable factor other than age defense," Tyson faces several insurmountable problems. As we have seen, the only such factor that it has been able to identify in this case is the petitioners' pension status. Again, that status is but a "proxy" for age in this case, so that it cannot, as a matter of law, qualify as a reasonable factor other than age.

Finally, of course, an employer may not defend in a disparate impact case at all unless he can show that the policy that the plaintiffs are challenging is related to job performance, *Griggs, supra,* 401 U.S. at 432, *Anderson v. Zubieta,* 180 F.3d 239, 344-347 (D.C. Cir. 1998).

The policy at issue in this case has absolutely nothing to do with job performance. Petitioners were doing the same jobs under identical conditions as their co-workers, despite their lesser pay.

At the very least, petitioners were entitled to a trial upon the disparate impact theory of recovery. Indeed, they were probably entitled to summary judgment as to liability upon their disparate impact theory of recovery, just as they were entitled to judgment as a matter of law upon liability as to their other theories.

CONCLUSION

For the foregoing reasons, petitioners request that this court issue a writ of certiorari in this case.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 03-5870

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHARLES MAYO ACREE, et al.,	)	
Plaintiffs-Appellants	)	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY**
v.	)	
TYSON BEARING CO., INC.,	)	
Defendant-Appellee.	)	

(Filed Feb. 11, 2005)

Before BOGGS, Chief Judge; GILMAN, Circuit Judge; and SARGUS, District Judge.*

SARGUS, District Judge. Plaintiffs, Appellants herein ("Plaintiffs"), appeal from the final judgment of the United States District Court for Western Kentucky at Bowling Green denying their Motion for Judgment as a Matter of Law or, in the alternative, Motion for a New Trial in this age-based discrimination case arising under the Kentucky Civil Rights Act, K.R.S. § 344.040(1). Plaintiffs, forty-nine (49) employees of Defendant-Appellee, Tyson Bearing Corporation, Inc. ("Tyson"), allege that the application of a collectively bargained agreement with the United Steel Workers of America, AFL-CIO, the labor organization representing the employees at Tyson,

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* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

discriminates against them on the basis of age in violation of the Kentucky Civil Rights Act. Plaintiffs appeal the jury verdict for Tyson in this diversity age discrimination action. For the reasons that follow, the judgment of the district court is **AFFIRMED.**

I.

Plaintiffs are all hourly employees over the age of 40 who work for Tyson. Each is a recipient of a pension from the former owner of the Tyson facility, SKF, USA, Inc. ("SKF"). Plaintiffs assert that Tyson pays them lower wages and provides them less advantageous vacation benefits than their co-workers because of their protected status as workers over the age of forty (40).

Effective June 11, 1999, Tyson, a corporate entity formed by its parent company, Roller Bearing Corporation of America ("RBC"), purchased the Tapered Bearing Division of SKF at Glasgow, Kentucky. Prior to the time of the purchase, the Tapered Bearing Division of SKF was experiencing financial difficulties. In February 1999, RBC proposed to take over and continue operating the Tapered Bearing Division in the same building that SKF occupied.

Most SKF tapered bearing employees were represented by the United Steelworkers of America, AFL-CIO ("Union"). Accordingly, Tyson negotiated with the Union over the terms and conditions of employment that would apply after the purchase.[1] Tyson negotiated with the

[1] Plaintiffs did not join the Union as a party. Tyson filed a third-party complaint against the Union and tried to join it as a party. The district court, however, granted the Union's motion to dismiss the third-party complaint. That issue is not before the Court.

Union, as well as suppliers, subcontractors, and salaried employees, in order to secure financial concessions so as to make the acquisition viable. As Tyson and the Union negotiated, Tyson understood that SKF was losing money and that the Tapered Bearing Division was expecting reduced sales volumes on an on-going basis. Tyson therefore anticipated that, after the parties finalized the transaction, it would be forced to reduce the employee roster to 130 from the approximately 260 employees then covered by the Union contract.

During the negotiations, Tyson's representative, Mike Gostomski, proposed a $5.00 per hour across the board wage reduction for all employees. The Union rejected this proposal. Instead, the parties developed the idea to allow SKF retirees to work at Tyson as "second tier" employees.[2] Ultimately, the concept of second-tier employees was memorialized in a Memorandum of Agreement. The Memorandum of Agreement provided, in pertinent part:

> It is contemplated . . . that certain members of the bargaining unit, currently employed by SKF, will retire under the SKF Pension Plan, prior to the closing date [June 15, 1999], pursuant to the 30-Year Retirement without actuarial reduction option (including these employees who are eligible to age into such option pursuant to the 1999 amendments to the labor contract) described in a

[2] The parties dispute the issue of who, as between the Union and Tyson, originally presented the idea of a second tier of employees. The district court determined that Plaintiffs had adduced evidence to the effect that Tyson imposed this obligation on the Union on a take-it-or-leave-it basis and that this dispute about a genuine issue of material fact precluded summary judgment on Plaintiffs' disparate treatment claim.

> Memorandum of Understanding between SKF and the Union or pursuant to an Early Retirement option with actuarial reduction, based on age 55 or older and at least 10 years of service, and will thereafter confirm to the Company that they are available for immediate employment in a Tyson Bearing Bargaining Unit position at the Tyson Bearing Glasgow facility after the closing date. The parties have agreed that such retirees (hereinafter "retiree-applicants") will be employed by the Company subject to certain terms and conditions that differ from the terms and conditions generally applicable under the labor contract.

(Memorandum of Agreement, at 2; Jx. at 206.) This modification created a class of 79 "retiree-applicants" which included all 49 of the Plaintiffs in this case. The retiree-applicants were to be treated, for compensation purposes, as employees hired after March 31, 1996.[3] This categorization meant that retiree-applicants would be paid $3.00 less per hour than they had been earning with SKF and that they would receive only two weeks of vacation time.[4] All

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[3] In particular, the Memorandum of Agreement indicated that a retiree-applicant " . . . shall be considered to be an employee hired after March 31, 1996, for purposes of Article XIV, Section 3., of the labor contract." (Memorandum of Agreement, Section III, "Retiree-Applicants"; Jx. 195.) Section XIV of the labor contract provided that "[a]ll employees hired after March 31, 1996 will be paid $3.00 per hour, lower than the prevailing wage scale in effect for this labor agreement." (Labor Agreement, Section XIV; Jx. 170.)

[4] The Union also bargained for a number of benefits for the retiree-applicants not otherwise available to individuals hired after March 31, 1996, including the following: (1) they would be assigned to the same position they held at SKF; (2) they would not have to serve another probationary period; (3) they would be eligible for insurance benefits as if they had been employed prior to March 27, 1993; (4) they would

(Continued on following page)

the retiree-applicants were receiving a pension from SKF when they became employees of Tyson. This class included only workers who had 10 years of service credit with SKF and had attained the age of 55, and employees with at least 30 years of SKF service.[5] Plaintiffs are among the class of employees who affirmatively severed their employment with SKF by retiring before the closing date and were rehired by Tyson after the sale.

The Memorandum of Agreement affected no other class of employees' wages or vacation time.[6] Some employees who were over the age of 40 and eligible for retirement from SKF chose not to do so. These active employees who were over 40 but who did not retire or begin receiving a pension from SKF transferred to Tyson and did not have their pay or vacation benefits reduced.

The Memorandum of Agreement was incorporated into the then-existing labor agreement between SKF and

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maintain their original seniority date from SKF for purposes of layoff, recall, transfers, filling of vacancies, and other such non-economic provisions of the Agreement; (5) they would be entitled to two weeks of vacation and would be eligible for increased vacation if certain production cost levels were reached; (6) they would be entitled to a monthly additional payment of $150 if they opted out of single medical coverage, or $250 if they opted out of married with or without dependents medical insurance coverage; (7) they would be entitled to certain wage increases based on Tyson's production costs in the future; and (8) they would not be required to take a medical examination to qualify for employment.

[5] Although second tier employees made $3.00 less per hour, with the reduced wage, plus their retirement benefit, the parties expected that the group would receive a combined wage and pension benefit that exceeded their former wage level.

[6] Other employees who started work after March 31, 1996 continued to have only two weeks of vacation and earn $3.00 less per hour than their previously hired counterparts.

the Union. On June 11, 1999, Tyson assumed the current collective bargaining agreement negotiated by the Union and SKF and signed the Memorandum of Agreement. Tyson therefore agreed to transfer active SKF employees to its payroll and to employ then-current SKF employees who had retired from SKF prior to the closing date.

After Tyson's takeover, some of the retiree-applicants filed a grievance asserting that the pay and vacation time reduction violated the collective bargaining agreement. The grievance was processed through the initial steps, but did not proceed to arbitration.

Plaintiffs filed a complaint in Kentucky state court on August 29, 2002 alleging age discrimination in violation of the Kentucky Civil Rights Act, K.R.S. § 344.040(1) and (2), asserting both disparate treatment and disparate impact theories of recovery. On October 5, 2001, Tyson removed the lawsuit to the United States District Court for the Western District of Kentucky.

On September 3, 2002, Tyson filed a motion for summary judgment, arguing that Plaintiffs had no proof of intentional discrimination and that Plaintiffs could not state a claim for disparate impact under the age discrimination provisions of the Kentucky Civil Rights Act. Plaintiffs responded and filed a cross-motion for summary judgment, arguing that the facially discriminatory nature of the policy at issue entitled them to summary judgment. The district court denied the parties' motions for summary judgment on January 2, 2003.

Both parties filed motions for reconsideration. Plaintiffs argued that they had submitted sufficient evidence of direct discrimination to justify summary judgment in their favor. Defendant maintained that Plaintiffs had shown

insufficient evidence of discriminatory intent to allege a cognizable claim of disparate treatment on the basis of age and that no disparate impact age discrimination cause of action exists under the Kentucky Civil Rights Act.[7] On February 7, 2003, the district court denied Plaintiffs' motion and granted Tyson's motion to the extent it argued that the Kentucky Civil Rights Act does not recognize an age-based discrimination claim under a disparate impact theory of recovery.

The parties proceeded to trial on the issue of disparate treatment. Plaintiffs submitted proposed jury instruction incorporating three theories of liability: (1) disparate impact; (2) disparate treatment based on circumstantial evidence that focused on a *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "pretext" analysis; and (3) disparate treatment based on the facially discriminatory nature of the policy at issue. The district court refused to give a disparate impact instruction and instead gave the following instructions:

> In order to prevail on their claim of age discrimination, the Plaintiffs must prove the following two essential elements by a preponderance of the evidence:
>
> (1) The Plaintiffs were forty years of age or older; and
>
> (2) Plaintiffs' age was a motivating factor in the Defendant's decision

[7] Defendant Tyson also argued that Plaintiffs' claims were preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). The district court rejected that argument. The issue of preemption, however, is not presently before the Court.

> to enter into the Memorandum of Agreement of June 10, 1999 that reduced Plaintiffs' compensation and benefits.
>
> The term "motivating factor" means a consideration that moved Defendant Tyson Bearing Co. toward its decision. A consideration can be a "motivating factor" without being the only motivation for a particular decision. However, it must have been a factor that actually led to the decision.
>
> The mere fact that Plaintiffs are 40 years of age or older and received reduced pay and benefits is not sufficient, in and of itself, to establish Plaintiffs' claim.

(Instruction 6, Jx. 137.)

The jury returned a verdict in favor of Tyson. Plaintiffs filed post-trial motions requesting judgment as a matter of law, or in the alternative, a new trial. The district court denied Plaintiffs' motions. This appeal followed.

II.

Plaintiffs assert error in the district court's denial of its (1) motion for summary judgment under Fed. R. Civ. P. 56; (2) motion for judgment as a matter of law (directed verdict) under Fed. R. Civ. P. 50(a); and (3) motion for judgment as a matter of law (notwithstanding the verdict) under Fed. R. Civ. P. 50(b). Plaintiffs also argue that the district court erred in denying its alternative motion for new trial. Finally, Plaintiffs maintain that the district court erred by failing to give certain jury instructions

relating to its theories of recovery for age-based discrimination.

"[W]here summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed." *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *see also Garrison v. Cassens Transport Co.*, 334 F.3d 528, 537 (6th Cir. 2003) (same). "[I]n cases where an appellant made a Rule 56 motion for summary judgment that was denied, makes those same arguments in a Rule 50(a) motion at the close of evidence that was also denied, lost in front of a jury, then renewed its arguments in a rejected Rule 50(b) motion after the entry of judgment, we will review only the denial of the Rule 50(b) motion." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174 (6th Cir. 1996). Because Plaintiffs asserted the same arguments in their Rule 56 motion for summary judgment and both motions for judgment as a matter of law with respect to all issues except those involving their disparate impact theory of liability under the Kentucky Civil Rights Act,[6] the Court reviews only the district court's denial of Plaintiffs' Rule 50(b) motion.

As to Plaintiffs' Rule 50(b) renewed Motion for Judgment as a Matter of Law, the Court reviews the denial *de novo*. *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595,

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[6] As set forth, *infra*, Plaintiffs allege that the Court should recognize a claim of discrimination under the Kentucky Civil Rights Act using a disparate-impact theory of recovery. Because the district court awarded summary judgment to Tyson on this claim, it was not properly the subject of any of the trial and post-trial motions. The district court's decision to award summary judgment to Tyson on the disparate impact claim is subject to *de novo* review.

598 (6th Cir. 2001). The Court does not "weigh the evidence, evaluate the credibility of the witnesses, or substitute our judgment for that of the jury." *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir. 1995). Instead, the Court must view the evidence in the light most favorable to the party against whom the motion is made, giving the non-moving party the benefit of all reasonable inferences. *Garrison*, 334 F.3d at 537 (citing *Phelps v. Yale Sec. Inc.*, 986 F.2d 1020, 1023 (6th Cir. 1993)). "The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant." *K & T Enters. Inc.*, 97 F.3d at 176; *Garrison*, 334 F.3d at 537-38.

The district court properly denied the motion for a new trial under Rule 50(b) " 'if the verdict is one that reasonably could be reached, regardless of whether the trial judge might have reached a different conclusion were he [or she] the trier of fact.' " *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 796 (6th Cir. 1996) (quoting *Wayne v. Village of Sebring*, 36 F.3d 517, 525 (6th Cir. 1994)). This Court will reverse a district court's denial of a motion for a new trial only on a showing of abuse of discretion. *Id.* An abuse of discretion is defined as "a definite and firm conviction that the trial court committed a clear error of judgment." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991).

The district court dismissed Plaintiffs' claim for age-based discrimination under their disparate impact theory of recovery and awarded summary judgment to Tyson on this claim. The standard of review applicable to the district court's decision to grant Tyson's Motion for

Summary Judgment is *de novo*. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).[9]

III.

Plaintiffs claims arise under the Kentucky Civil Rights Act ("KCRA"). The statute provides that it is unlawful for an employer:

> (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's . . . age forty (40) and over . . . [and]
>
> (2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment

[9] Plaintiffs presented jury instructions relating to their various theories of liability. The district court did not give instructions relating to Plaintiffs' disparate impact claim because it had dismissed that claim on summary judgment. The district court also rejected an instruction on Plaintiffs' claim that the Memorandum of Agreement is direct evidence, in and of itself, of age discrimination. Tyson contends that Plaintiffs waived their objections to the jury instructions by failing to reassert their arguments at the charge conference. Regardless of whether Plaintiffs objected to the jury instructions in this case, Fed. R. Civ. P. 51, which requires a party to object to jury instructions on the record, does not prevent normal appellate review of the underlying merits issues here because Plaintiffs made all necessary arguments to preserve the matters in its appeal with respect to their disparate treatment claim, including whether the Memorandum of Agreement was direct evidence, in its Rule 50 motion for judgment as a matter of law or alternately for a new trial. Similarly, with respect to their disparate impact claim, Plaintiffs preserved their arguments through their appeal of the district court's denial of their Rule 56 motion for summary judgment.

> opportunities or otherwise adversely affect status as an employee, because of the individual's . . . age forty (40) and over. . . .

K.R.S. § 344.040(1) & (2). Kentucky courts typically interpret the age discrimination proscriptions of the KCRA to mirror the prohibitions set forth in the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 *et seq.* ("ADEA"), and hence look to federal cases for guidance in applying the state law.[10] *Harker v. Federal Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky.1984).

Generally, a plaintiff may rely upon one of two alternate theories of recovery to establish a claim of illegal discrimination: disparate treatment or disparate impact. The Supreme Court often distinguishes between the two theories of discrimination and describes the distinction as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be

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[10] The ADEA provides as follows:

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

29 U.S.C. § 623(a)(1) & (2).

> inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted).

Plaintiffs have invoked both disparate treatment and disparate impact theories in this case. Plaintiffs' ability to recover for age discrimination based on a disparate treatment theory is well-supported in the language of the ADEA and in this Court's precedent. Plaintiffs' ability to recover based upon a disparate impact theory, however, is unsettled in this and other circuits. We turn first to Plaintiffs' contentions under disparate treatment as a theory of recovery and, given the context in which Plaintiffs argue it, decline to rule on Plaintiffs' disparate impact claim.

A. Disparate Treatment

1. Direct Evidence

Plaintiffs maintain that Tyson's retiree-applicant wage and benefit policy, which directed wage and benefit cuts to a group of workers who were all over the age of 40, discriminates on its face against them on the basis of their age. Plaintiffs argue that any policy that by its express

terms, applies only to the detriment of members of a protected class is discriminatory on its face. Because a Tyson employee had to be over the age of 40 in order for the wage and benefit reductions to apply, Plaintiffs argue that the policy discriminated against all the members of the group of retiree-applicants on its face.

Plaintiffs argue that the Memorandum of Agreement is direct evidence, in and of itself, of age discrimination, and that they are therefore entitled to judgment as a matter of law on the issue of liability. Plaintiffs rely on *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), in support of their argument that a discrimination plaintiff need only prove that a facially discriminatory policy exits, and nothing more, in order to prevail on the claim.

In *Thurston*, the airline, TWA, adopted a policy whereby captains who became disqualified from serving as pilots for reasons other than age could remain working and could automatically displace less senior flight engineers. 469 U.S. at 116. Captains who reached the age of 60, however, could not automatically "bump" flight engineers and could remain with the airline only if they had been able to obtain flight engineer status through the bidding procedures outlined in the collective bargaining agreement. If the airline had no vacancy prior to a captain's 60th birthday, or if the captain lacked the requisite seniority to bid on a vacancy, the captain would be retired. *Id.* A captain displaced for any reason besides age did not have to resort to the bidding procedures of the labor agreement. *Id.* at 116-17. The Supreme Court held that the airline's facially discriminatory job-transfer policy violated the ADEA. *Id.* at 128. *Thurston* did not, however, establish the unequivocal principle that an employer's facially discriminatory policy will in every instance and

without more entitle an ADEA claimant to judgment as a matter of law. Case law following *Thurston* clarifies the standards of liability under the ADEA.

Plaintiffs misapprehend the nature of direct proof necessary to sustain their claim in a disparate treatment case. In the context of discrimination cases, "direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999); *see also Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994) (evidence that requires the jury to infer a fact is not direct evidence). Plaintiffs point to no evidence that Tyson deliberately selected them and intended to discriminate against them on the basis of age. Importantly, Plaintiffs voluntarily chose to retire from SKF prior to the takeover by Tyson. Other than pointing to the policy itself, Plaintiffs offer no evidence to suggest that discrimination was at least a motivating factor.

The policy itself does not treat similarly situated individuals differently because of their age. The retiree-applicants are not similarly situated to the employees who did not terminate employment with SKF prior to the closing date. That is, Plaintiffs are distinguishable from those employees who remained active employees and do not receive a pension from SKF. Tyson argues that the financial position of the retiree-applicants actually improved after the sale from SKF, notwithstanding the $3.00 reduction in pay. Those employees who elected to receive the pension ended up with a combined pension and wage rate that exceeded their compensation prior to this sale.

Moreover, in a disparate treatment case, liability depends on whether the protected trait – in this case, age – motivated the adverse employment decision. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* Accordingly, *Hazen Paper* clarified that, under the ADEA, proof of discriminatory motive is critical to the success of a plaintiff's discriminatory treatment claim. *Id.*

This Court has consistently emphasized that a claim of disparate treatment under the ADEA requires proof of discriminatory motive. *See, e.g., Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994); *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135, 138 (6th Cir. 1995); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 (6th Cir. 1998).[11] The ADEA prohibits adverse employment action that is actually motivated by age. There is no disparate treatment under the ADEA, however, when an employer acts on the basis of other factors that are only empirically correlated with age, such as pension status, seniority, or wage rate. *Hazen Paper*, 507 U.S. at 609; *Gantt*, 143 F.3d at 1048; *Allen*, 33 F.3d at 677; *Lyon*, 53

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[11] Similarly, the Kentucky Civil Rights Act makes it an unlawful practice to discriminate against an individual in the terms or conditions of employment "*because of* the individual's . . . age forty (40) and over . . . " K.R.S. § 344.040(1) (emphasis added); see also K.R.S. § 344.040(2) (noting unlawful employment practice to "limit, segregate, or classify employees . . . *because of* the individual's . . . age forty (40) and over . . ") (emphasis added).

F.3d at 138.[12] Recently, the Supreme Court emphasized that an employer does not violate the ADEA by acting on the basis of other factors, such as pension status:

> [In *Hazen Paper*,] . . . we held there is no violation of the ADEA in firing an employee because his pension is about to vest, a basis for action that we took to be analytically distinct from age, even though it would never occur without advanced years . . . We said that "the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age," . . . whereas discrimination on the basis of pension status "would not constitute discriminatory treatment on the basis of age [because t]he prohibited stereotype [of the faltering worker] would not have figured in this decision, and the attendant stigma would not ensue. . . . "

General Dynamics Land Sys., Inc. v. Cline, 124 S.Ct. 1236, 1244 (2004) (citations omitted).

Tyson argued at trial that it was motivated by financial considerations and that it negotiated the Memorandum of Agreement in order to make the sale and transfer

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[12] The KCRA is similar in this respect and provides that discrimination in wages or conditions of employment is not unlawful when made on a basis other than age:

> Notwithstanding any other provision of this chapter, it is not an unlawful practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . *if the differences are not the result of an intention to discriminate* because of . . . age forty (40) and over. . . .

K.R.S. § 344.100 (emphasis added).

of SKF, a failing business, financially feasible. Plaintiffs recognize that Tyson acted for financial reasons, but assert that Tyson drew these distinctions based on the affected employees' age and pension status. Plaintiffs contend that Tyson itself argued that it distinguished the employees according to their pension status. Tyson denies that it drew any distinctions based on age or pension status but instead consistently argued that it was driven solely by financial considerations.

Even if Tyson had been motivated by the retiree-applicants' pension status, that factor is not an impermissible basis even though it is an empirical correlate with age. Plaintiffs say that the retiree-applicants' pension status was an obvious proxy for their age of 40 and over and that Tyson used pension status as an excuse to discriminate against them on the basis of age. Plaintiffs' argument, however, is not supported by any evidence of record.

A plaintiff is not precluded from pursuing the possibility that an employer "who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination." *Hazen Paper*, 507 U.S. at 612-13. "Pension status may be a proxy for age . . . in the sense that the employer may suppose a correlation between the two factors and act accordingly." *Id.* at 613. Plaintiffs contend that Tyson "*had to* suppose such a correlation . . . because of the *obvious* age-biased parameters (age 55 years or 30 years of company service with SKF) of the 'retiree-applicant' policy." Appellants' Brief, at p. 33 (emphasis in original). This argument either presupposes that there was direct evidence of Tyson's motivation or relies too heavily on Plaintiffs' unsupported theory that the retiree-applicant

policy violated the ADEA *per se*. The only evidence Plaintiffs produced that the pay reduction was motivated by discriminatory animus was the adverse *impact* of the policy. While a plaintiff is not precluded from seeking to prove that pension status was a subterfuge for age discrimination, the record here does not contain evidence to support such a contention.

This Court has underscored that "[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations." *Allen*, 33 F.3d at 677. Consequently, the Court has held that to state a claim under the ADEA, "plaintiffs must allege that [defendant] discriminated against them because they were old, not because they were expensive. . . . " *Id.* at 677; *see also EEOC v. American Tel. & Tel. Co.*, 2000 WL 332006, No. 98-4348 (6th Cir. March 22, 2000) (unpublished). In this case, Plaintiffs have offered no facts or direct evidence that Tyson intended for the retiree-applicant policy to discriminate against the employees on the basis of their protected trait of age.

Under a *de novo* standard of review, the district court therefore did not err is denying Plaintiffs' motion for judgment as a matter of law in this regard. With respect to Plaintiffs' motion for new trial, the jury in this case reached the conclusion that the Defendant had no intent to discriminate on the basis of age. This Court may reverse the decision of the district court only if "reasonable minds could not come to a conclusion other than the one favoring the movant [Plaintiffs]." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). After a review of the

record, we find that the decision of the district court was not erroneous.

2. Circumstantial Evidence

Without direct evidence of discrimination, Plaintiffs must rely on the burden-shifting framework first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to prove disparate treatment. Although the Kentucky Supreme Court has not squarely addressed whether the *McDonnell Douglas* burden-shifting analysis applies to age discrimination cases under the KCRA, the parties do not dispute the issue and we will therefore assume that it does. *Harker*, 679 S.W.2d at 229-30; *Turner v. Pendennis Club*, 19 S.W.3d 117, 119-20 (Ky. App. 2000).

Because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), courts have employed some variant of the framework articulated in *McDonnell Douglas* to analyze claims that are based largely on circumstantial evidence that arises under the ADEA. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Under this framework, a plaintiff alleging age discrimination has the initial burden of establishing a prima facie case of intentional discrimination. *Id.* Once the plaintiff establishes a prima facie case of intentional discrimination, the burden of production shifts to the defendant to articulate a nondiscriminatory reason for its actions. *Weigel v. Baptist Hosp. of East Tenn.*, 302 F.2d 367, 377 (6th Cir. 2002). If the employer carries its burden of articulating a nondiscriminatory

reason for its decision, the presumption of discrimination that arises from the plaintiff's prima facie case disappears and the plaintiff must show that the defendant's proffered explanation is merely a pretext for discrimination. *Burdine*, 450 U.S. at 255-56. The plaintiff may establish pretext by showing "either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge." *Manzer*, 29 F.3d at 1084 (quotation marks omitted). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated," although such a showing might not "always be adequate to sustain a jury's finding of liability." *Reeves*, 530 U.S. at 148. Irrespective of whether Plaintiffs' proof of disparate treatment is direct or circumstantial, the ultimate question regarding liability is the same. Liability depends on whether the protected trait, in this case, age, actually motivated the employer's decision. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 584 (6th Cir. 2003) (citing *Reeves*, 530 U.S. at 141).

The parties do not dispute that Plaintiffs met their initial burden of establishing a prima facie case. The parties focus instead on the element of pretext. Plaintiffs argue that Tyson was unable to articulate a legitimate non-discriminatory reason for enforcing the policy mandated by the Memorandum of Agreement.

Tyson claimed as a nondiscriminatory reason for its action that the wage and vacation benefit reduction was necessary to make its acquisition of an unprofitable and failing commercial enterprise a viable business decision. Tyson further asserts that the Union agreed to the

company's plan to limit a reduction in wages to the retiree-applicant class, rather than an across-the-board $5.00 wage reduction for all employees. In this manner, at the end of the day, no employee retained by Tyson was earning less – if pension benefits are included – than that employee earned before the buyout. According to Tyson, this method was designed to prevent a pay cut to any employee, not to discriminate against older workers.

Plaintiffs acknowledge Tyson's stated reason for the retiree-applicant policy was to save money and to permit the plant to stay open, but argue that such cost-savings measures may not be implemented in a discriminatory fashion. Because Plaintiffs argue that the policy was discriminatory on its face as against older workers, Plaintiffs maintain that Tyson's articulated business justification is not "legitimate." Plaintiffs argue that Tyson could have achieved the same cost-savings benefits using other methods, but chose instead to cut wages and vacations benefits of the retiree-applicants.

Plaintiffs, however, may not prove pretext by attacking the soundness of an employment decision. *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 490 (6th Cir. 2000); *Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 898 (6th Cir. 1997). "An age discrimination action is not 'a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities.'" *Brocklehurst*, 123 F.3d at 898 (quoting *Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983)). Plaintiffs have not shown that Tyson's proffered cost-savings justification had no basis in fact, was not the actual reason motivating the decision to implement the retiree-applicant policy, or that its reason was insufficient

to justify the decision. Further, Plaintiffs have not produced any evidence that Tyson's stated reasons for agreeing with the proposal to treat retiree-applicants as new employees – to save money, to make the acquisition viable, and prevent a cut in over-all compensation to each employee – were false.[13] Plaintiffs insist that the policy was discriminatory, but they did not provide more than that assertion in their attempts to persuade the jury that Tyson's stated business justification was a pretext for discrimination.

Plaintiffs argue that they were entitled to judgment as a matter of law on liability, applying the *McDonnell Douglas* framework. Employing the burden shifting model articulated in *McDonnell Douglas* to analyze Plaintiffs' ADEA claims, Plaintiffs failed to show pretext, or that age played a role in the decision-making process relating to the decision to implement the Memorandum of Agreement.

The district court therefore was correct in denying Plaintiffs' motion for judgment as a matter of law and is affirmed. To the extent that Plaintiffs sought a new trial on these issues, the jury's verdict is reasonably supported such that the district court properly denied Plaintiffs' motion for new trial.

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[13] Again, the parties dispute whether the Union first proposed the idea of a second tier of employees or if Tyson presented the plan on a take-it-or-leave-it basis. Tyson points to trial testimony indicating that its representatives did not present the idea. (Gostomski Testimony, Jx. 258-62, 302; Bartley Testimony; Jx. at 331). Plaintiffs point to testimony that Tyson representatives first presented the proposal. (Bartley Testimony, Jx. 335-36.) In any event, there is no dispute that the challenged pay structure was agreed upon by the Defendant with the Union.

B. Disparate Impact

Plaintiffs conceded that proof of "pure" disparate impact, without more, "probably does not apply to an age discrimination case." (Appellants' Brief, p. 44; Response to Mot. for Summ. Jdgmt., p. 17.) They argue nonetheless that they were entitled to rely on a disparate impact theory to prove intentional discrimination under a circumstantial proof model. According to Plaintiffs, the retiree-applicant policy has a *per se* disparate impact upon a protected class. They argue that, by its very nature, any facially discriminatory policy will have a disparate impact upon the individuals to whom it applies. Plaintiffs maintain that the district court erred when it did not permit them to present its disparate impact theory to the jury. The Plaintiffs further contend that the district court failed to include jury instructions relating to this claim. It appears that Plaintiffs misconstrue the application and contours of a disparate impact claim.

The issue of whether the ADEA contemplates an action on a disparate-impact basis is the subject of intense debate.[14] The Supreme Court, in fact, recently granted a petition for a *writ of certiorari* to the United States Court of Appeals for the Fifth Circuit to decide whether a disparate impact theory of liability is available under the ADEA. *Smith v. City of Jackson, Miss.*, 124 S.Ct. 1724 (2004).[15]

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[14] No Kentucky state court has expressly addressed whether a disparate impact theory of recovery for age-based discrimination is available under the Kentucky Civil Rights Act.

[15] The Supreme Court had previously agreed to decide the issue in late 2001, but dismissed the case following a brief oral argument

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As it stands, the Supreme Court in *Hazen Paper*, 507 U.S. 604 (1993), cast considerable doubt on the viability of disparate impact claims in age discrimination cases. The Court recognized that it had "never decided whether a disparate impact theory of liability is available under the ADEA," and expressly declined to decide the issue on the facts presented in that case. *Id.* at 610. The Court emphasized, however, that Section 4(a)(2) of the ADEA prohibits an employer from taking adverse employment actions "because of [an] individual's age." 29 U.S.C. § 623(a)(2). The Court therefore held that the most natural reading of the ADEA compels the conclusion that it prohibits only intentional age-based discrimination. *Id.* The Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Id.* Although the Court focused on clarifying the standards for liability under the ADEA in a disparate treatment case, the concurrence noted that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618 (Kennedy J., concurring).

The circuits are divided as to whether disparate impact claims are cognizable under the ADEA. The Second, Eighth, and Ninth Circuits have found that, because the language of the ADEA parallels Title VII of the Civil Rights Act of 1964, disparate impact claims also should be allowed under the ADEA.[16] In contrast, the viability of

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indicating that the *writ of certiorari* had been improvidently granted. *Adams v. Florida Power Co.*, 535 U.S. 228 (2002).

[16] *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *see also Adams v.*

(Continued on following page)

disparate impact claims under the ADEA have been questioned by the First, Third, Seventh and Tenth Circuits.[17]

This Court has recognized the uncertain availability of a disparate impact claim in age discrimination cases, but has not yet definitely decided the issue. *See Lyon v. Ohio Educ. Ass'n & Prof. Staff Union*, 53 F.3d 135, 139-40 n.5 (6th Cir. 1995) (noting that "[t]here is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory . . . [but] this circuit has stated that a disparate-impact theory of age discrimination may be possible.") (citing *Abbott v. Federal Forge*, 912 F.2d 867 (6th Cir. 1990)); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 & n.6 (6th Cir. 1998) ("Although we stated in *Abbott v. Federal Forge* . . . that a disparate-impact theory of age discrimination may be possible, we have subsequently noted that in light of the Supreme Court's decision in *Hazen Paper*, . . . there is now 'considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory.'" (citations omitted)). Indeed, this Court opined in *Lyon* that the Supreme Court's "focus in *Hazen Paper* on Congress's intent to prevent discrimination based on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age-neutral policies are not redressable." *Lyon*, 53 F.3d at 139 n.5.

Florida Power Corporation, 255 F.3d 1322, 1324 (11th Cir. 2001) (collecting cases).

[17] *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995).

In the present case, recognizing the differences between Title VII and the ADEA, the admonitions of *Hazen Paper*, and the apparent trend among the courts of appeals to conclude that the ADEA does not support a disparate impact claim, the district court determined that there could be no recovery in this circuit under the ADEA using such a theory. Given the similarities between the ADEA and the KCRA, the district court also declined to allow a disparate impact claim under the state KCRA. The district court therefore awarded summary judgment to Tyson on Plaintiffs' disparate impact claim and subsequently refused to charge the jury on this theory of liability.

Under the circumstances presented here, we need not decide whether this Circuit will condone disparate impact as a viable theory of recovery in an age discrimination case. Plaintiffs concede that a cause of action "probably" does not exist under the ADEA for disparate impact claims. While they argue that the district court should have permitted them to employ a disparate impact theory as a means to recovery, they do not appear to argue that this Court should adopt the theory as viable under the ADEA. Instead, Plaintiffs argue that they have established a case of disparate treatment by virtue of a wage scale that has a disparate impact on older workers. This argument is effectively foreclosed under the disparate treatment analysis above.

Further, this case arises in the context of the Kentucky Civil Rights Act, not the ADEA. The Supreme Court of Kentucky has not spoken on this important matter as it relates to its state law. For these reasons, the Court declines the opportunity to opine any further than it has in the past in *Lyon* and *Gantt* given the facts presented here.

C. Evidentiary Issues and Motion for New Trial

Plaintiffs also assert that the district court erred in admitting certain testimony concerning what Plaintiffs' Union representatives said during negotiations. If a trial court has improperly admitted evidence and a substantial right of a party has been affected, a new trial may be warranted. Generally, the grant or denial of a new trial is purely within the discretion of the trial court and will not be reversed except upon a showing abuse of discretion. *Whittington v. New Jersey Zinc Co.*, 775 F.2d 698, 700 (6th Cir. 1985).

Plaintiffs argue that Tyson should not have been permitted to shift responsibility for its discriminatory conduct to the Union. Before trial, Plaintiffs moved to limit any testimony that would attempt to show that they had waived their rights by being members of a union that had agreed to the policy about which they were complaining. Plaintiffs based their arguments on the district court's reasoning in its Opinion and Order dismissing Tyson's third-party complaint against the Union. The district court did not rule on this motion. Mike Gostomski testified that Joe Villines, a Union representative, had suggested the basic parameters of the retiree-applicant policy. Plaintiffs now assert that the testimony should not have been admitted because it was hearsay.

A district court's evidentiary determinations are subject to an abuse of discretion standard of review. *See United States v. Rios*, 842 F.2d 868, 872 (6th Cir. 1988). A district court's conclusions of law, however, such as whether proffered evidence constitutes hearsay within the meaning of the Federal Rules of Evidence, are reviewed *de*

novo. United States v. Levy, 904 F.2d 1026, 1029 (6th Cir. 1990).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The district court's determination to admit Mr. Gostomski's testimony that Joe Villines, Staff Representative for the Union, suggested and agreed to the retiree-applicants' portion of the Memorandum of Agreement was proper. First, the statements were admissible non-hearsay used to show Gostomski's state of mind. Whether the retiree-applicant reductions would be agreeable to the Union members is immaterial; the testimony that the Union would not accept the across-the-board reductions, but would allow selective reductions, was not used to prove the truth of the matter asserted, but to show Tyson's state of mind in adopting the proposal.

Second, this statement, having a bearing on the intent underlying Tyson's subsequent conduct, is admissible. *McCormick on Evidence* § 249, 100-01 (5th Ed. 2003). The statements constituted part of the verbal act of contract offer and acceptance of the type that is excluded from the definition of hearsay. *Preferred Properties, Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 798 n.5 (6th Cir. 2002) ("The verbal acts doctrine applies where 'legal consequences flow from the fact that words were said, *e.g.* the words of offer and acceptance which create a contract.'" (quoting Black's Law Dictionary 1558 (6th Ed. 1990))).

Third, even assuming that the statements were otherwise inadmissible hearsay, they would be admissible either as a statement by Plaintiffs' agent concerning a matter within the scope of the agency made during the

existence of the relationship, or as a statement by a person authorized by the Plaintiffs to make a statement concerning the subject. Fed. R. Evid. 801(d)(2)(D); Fed. R. Evid. 801(d)(2)(C).

Because the district court correctly ruled that Gostomski's testimony concerning what Plaintiffs' union representative said during negotiations was admissible, Plaintiffs were not entitled to a new trial on that basis. The district court decision in this respect, therefore, is affirmed.

IV.

For the foregoing reasons, the decision of the district court is **AFFIRMED** in all respects.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:01 CV-175-R

CHARLES MAYO ACREE, et al. PLAINTIFFS

v.

TYSON BEARING COMPANY, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on the parties' cross-motions for summary judgment (Dkt. Nos. 17 & 19.) The parties have further briefed the issue (*see* Dkt. # 21 & 24), and this matter is now ripe for adjudication. For the reasons that follow, both motions are **DENIED**.[1]

BACKGROUND

The Plaintiffs are all hourly employees over the age of 40 who work for the Defendant, Tyson Bearing Company, Inc. Plaintiffs, who are fifty in number, claim that Tyson pays them lower wages and gives them less advantageous vacation benefits than their co-employees because of their status as recipients of a pension from the former owner of the Tyson facility. Plaintiffs further aver that this recipient status is unique to individuals over 40, and that Tyson's behavior constitutes age discrimination in violation of the Kentucky Civil Rights Act, K.R.S. § 344.040(1).

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[1] Plaintiff has also filed a motion for oral arguments (Dkt. # 23). The Court finds that oral arguments would not be particularly helpful in resolving the instant dispute, and that motion will be **DENIED** as well.

On June 11, 1999, Tyson and Plaintiff's labor union, the United Steelworkers of America ("the Union"), agreed that Tyson would assume the existing labor agreement recently negotiated between the Union and Tyson's predecessor, SKF USA, Inc.[2] Representatives from Tyson and the Union signed a Memorandum of Agreement, which provided, in pertinent part:

> It is contemplated . . . that certain members of the bargaining unit, currently employed by SKF, will retire under the SKF Pension Plan, prior to the closing date [June 15, 1999], pursuant to the 30-Year Retirement without actuarial reduction option (including these employees who are eligible to age into such option pursuant to the 1999 amendments to the labor contract) described in a Memorandum of Understanding between SKF and the Union or pursuant to an Early Retirement option with actuarial reduction, based on age 55 or older and at least 10 years of service, and will thereafter confirm to the Company that they are available for immediate employment in a TYSON Bargaining Unit position at the Tyson Glasgow facility after the closing date. The parties have agreed that such retirees (hereinafter "retiree-applicants") will be employed by the Company subject to certain terms and conditions that differ from the terms and conditions generally applicable under the labor contract.

(Dkt. # 17, Exh. 1: Memorandum of Agreement at 2.)

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[2] At the time, Tyson was in the process of purchasing part of SKF's operations.

Under the Memorandum of Agreement between the Union and Tyson, employees who fit within the aforementioned description of "retiree-applicants" were to be treated, for compensation purposes, as employees hired after March 31, 1996. This categorization meant that retiree-applicants would be paid $3 per hour less than they had been earning with SKF, and that they would only receive two weeks vacation time. No other class of employees had their wages or vacation time so reduced upon the Tyson takeover, although employees who started work after March 31, 1996 had always received only two weeks of vacation time and $3 per hour less than their previously-hired counterparts. Employees who were over 40 but did not begin receiving a pension upon the facility's transfer from SKF to Tyson did not have their pay or vacation time reduced.

Subsequent to Tyson's takeover, some of the affected retiree-applicants filed a grievance asserting that the pay and vacation time reduction was a violation of the labor agreement. The grievance proceeded to resolution, but was never taken to arbitration.

STANDARD

Summary judgment is available under Fed.R.Civ.P. 56(c) if the moving party can establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Harsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of the evidence. To support his position, he must present evidence on which the trier of fact could find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). Finally, although Kentucky state law governs the underlying dispute in this case, a federal court in a diversity action applies the standards of Fed. R. Civ. P. 56, not Kentucky's summary judgment standard. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 165 (6th Cir. 1993).

DISCUSSION

Tyson asserts two independent grounds for summary judgment. First, it argues that Plaintiffs' discrimination claims are preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. Second, it argues that the Plaintiffs have failed to establish age discrimination under K.R.S. § 344.040(1). Plaintiffs counter that their claims are not preempted and that they have established age discrimination by Tyson such that summary judgment is warranted in their favor.

I. Preemption

Section 301 of the Labor-Management Relations Act governs "[s]uits for violation of contracts between an employer and a labor organization. . . ." 29 U.S.C. § 185(a). Courts have interpreted this provision to preempt state law claims when resolution of the state law claim "requires the interpretation of a collective bargaining agreement," *Lingle v. Norge Div. of Magic Chef Inc.*, 486 U.S. 399, 413 (1988), or where resolution is "substantially dependent on analysis of a collective bargaining agreement," *IBEW v. Hechler,* 481 U.S. 851, 859 n.3 (1987). *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 394 (1987). Section 301 has no effect upon claims that are independent of the union contract or that only tangentially involve a part of the union contract. *See, e.g., Livadas v. Bradshaw,* 512 U.S. 107 (1994); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985). "[W]henever a plaintiff's state law claim can be resolved without interpreting the CBA itself, the claim is 'independent' of the CBA for preemption purposes," *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) (citation, quotation marks, and alterations omitted), and the LMRA does not preempt the claim.

The Sixth Circuit has developed a two-step approach for determining whether Section 301 preemption applies:

> First the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one

> criterion is satisfied, section 301 preemption is warranted.

DeCoe v. Gen. Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994) (citations omitted).

Without question, the right asserted here – the right to be free of discrimination based on age – is one borne of state law. The parties disagree, however, over whether resolution of Plaintiffs' discrimination claims would require interpretation of the collective bargaining agreement. Defendant contends that Plaintiffs' discrimination claims directly attack the "retiree-applicant" designation under the amended collective bargaining agreement and should be preempted. Plaintiffs counter that the meaning of no contract terms are disputed; rather, it is the relevant provision's agreed upon meaning and effect that are alleged to be discriminatory. The Court agrees with Plaintiffs that, although their claim requires "interpretation" of the contract in the sense that the Plaintiffs' "retiree-applicant" status is determined by contract, the discrimination claims are not preempted. Preemption under section 301 is invoked to prevent state interference with consistent interpretation of a collective bargaining agreement. *See Lingle,* 486 U.S. at 405-06. No such risk is present here, since the parties do not dispute contractual meaning. Instead, they argue whether the implementation of the wage and vacation time reductions called for in the contract are discriminatory in violation of the Kentucky Civil Rights Act's prohibition of age discrimination.

In this regard, the present case is analogous to that recently facing the Sixth Circuit in *Ivery v. Chrysler Corp.*, 31 Fed. Appx. 841, 2002 WL 273769 (6th Cir. Feb. 25, 2002) (per curiam). There, the plaintiffs complained that

an apprentice program established by the collective bargaining agreement was being administered in a discriminatory manner. The court noted that in making the preemption determination, "the central question is not whether some reference to the CBA must be made, but whether or not some element of the state cause of action necessarily requires an interpretation of the CBA." *Id.* at 845, 2002 WL 273769, at *4. The court then held that "a state-created antidiscrimination tort claim is independent from the terms set forth in a CBA unless an element of the same tort is necessarily determined by an interpretation of the CBA." *Id.* It next termed the case before it a "garden-variety" discrimination case, where the key issues were employer actions and intent, not whether or not the employer complied with the contract. *Id.* Reasoning that the defendants could be found liable despite complying with the contract or found not liable despite violating the contract, the court concluded that preemption was inappropriate. *Id.* at 845-46, 2002 WL 273769, at *4-5. For similar reasons, preemption is not proper here.

II. Discrimination[3]

A plaintiff may rely upon one of two alternative theories – disparate treatment or disparate impact[4] – in

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[3] In *Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984), the Kentucky Supreme Court announced it would rely on federal case law to interpret the age discrimination protections under the KCRA. *Id.* at 229. Therefore, the Court will rely on decisions interpreting the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*, in evaluating the Plaintiffs' age discrimination claims.

[4] Although the Supreme Court has expressly declined to rule on whether a disparate impact theory can be employed to establish an age

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establishing age discrimination. Here, Plaintiffs have invoked both theories.

A. Disparate Treatment

As the Supreme Court has noted,

> "disparate treatment" . . . is the most easily understood discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . .

Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (quoting *Teamsters v. United States,* 431 U.S. 324, 335-36 n.15 (internal citation omitted)) (alteration in original). Consequently, liability in a disparate treatment case depends upon whether the protected trait (age, in this case) actually motivated the employer's actions. *Id.* at 610.

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discrimination claim, *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993), the Sixth Circuit precedent indicates that such a method is appropriate, *see Lyon v. Ohio Educ. Ass'n & Professional Staff Union,* 53 F.3d 135, 139 n.5 (6th Cir. 1995) (citing *Abbott v. Fed. Forge,* 912 F.2d 867 (6th Cir. 1990)).

Without any direct evidence of discrimination,[5] Plaintiffs must rely on the burden-shifting framework first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined by *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), to prove discrimination using the disparate treatment theory. *See Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226, 229-30 (Ky. 1984); *Turner v. The Pendennis Club*, 19 S.W.3d 117,119-20 (Ky. App. 2000); *Ky. Ctr. for the Arts v. Handley*, 827 S.W.2d 697, 699 (Ky. App. 1991). Under this framework, a plaintiff alleging age discrimination has the initial burden of establishing a *prima facie* case of intentional discrimination in employment. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 142 (2000). To meet this relatively easy burden, a plaintiffs must establish that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside the protected class, or a person outside the protected class was treated more favorably than he was. *Barnett v. Dept. of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998); *see Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538-39 (6th Cir. 2002); *Braithwaite v. The Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001).

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[5] Plaintiffs contend that Tyson's decision to cut their pay and vacation time constitutes direct evidence of discrimination. This action constitutes circumstantial, not direct, evidence. *See Bartlik v. United States Dept. of Labor*, 73 F.3d 100, 103 n.5 (6th Cir. 1996) ("[D]irect evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor." (citations and quotation marks omitted)); *Carter v. Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989) ("Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption.").

If the plaintiff is able to establish a *prima facie* case, the employer is faced with a "burden of articulation" where a presumption of discrimination is created and the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for its action. *Reeves,* 530 U.S. at 142; *Barnett,* 153 F.3d at 341. If the employer carries its burden, the presumption of discrimination vanishes, and the plaintiff must prove by a preponderance of the evidence that the articulated reason was actually a pretext for discrimination. *Reeves,* 530 U.S. at 143; *see Braithwaite,* 258 F.3d at 493. A plaintiff may establish pretext by showing that (1) the stated reason had no basis in fact; (2) the stated reason was not the actual reason; or (3) that the stated reason was insufficient to explain the employer's action. *Manzer v. Diamond Shamrock Chems. Co.,* 29 F.3d 1078, 1084 (6th Cir. 1994). Pretext cannot be shown unless the plaintiff proves both that the proffered reason was false and that discrimination was the real reason. *St Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515 (1993); *see Reeves,* 530 U.S. at 146-48. Throughout this entire three-step process, the plaintiff bears the burden of persuasion. *Burdine,* 450 U.S. at 255 n.8.

It appears from the facts that Plaintiffs have met their burden of establishing a *prima facie* case. Plaintiffs, all over forty years of age, are all within the protected class of K.R.S. § 344.040(1). They apparently all began working for Tyson in the same or substantially similar positions that they occupied when employed by SKF, so there is little doubt of their qualifications. Each suffered the reduction in wages and benefits mandated by the Memorandum of Agreement, and similarly-situated workers (i.e., those hired prior to March 31, 1996) under

the age of forty did not receive the wage or vacation time reductions.[6]

As a legitimate, nondiscriminatory reason for its action, Tyson claims that the wage and benefit reduction was necessary to make its acquisition of a floundering and unprofitable business a viable business decision. Tyson further claims that it initially proposed an across-the-board wage reduction, but was told by the Union that limiting the reduction to what would become the "retiree-applicant" class was a preferable outcome because it would be "an easier sell" to the Union membership. Thus, Tyson claims that it enacted wage reductions in a need to cut costs and that it elected the limited reduction on advice from the Union.

With this showing, the Plaintiffs must now present evidence from which a reasonable jury could find by a preponderance of the evidence that the articulated reason was actually a pretext for discrimination. Attempting to make this showing, Plaintiffs essentially make two arguments: (1) that Tyson made the reduction decision unilaterally and engaged in no negotiation with the Union regarding any wage reductions (instead merely proffering the reduction on a "take-it-or-leave-it" basis); and (2) that membership in the group affected by the wage reduction was limited, even in theory, to individuals over forty.[7] It

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[6] Although workers hired after March 31, 1996 (both over and under 40 years of age) also received $3 per hour less than their previously-hired counterparts, the "retiree-applicant" class is the only group that was hired before the cutoff date to be subject to the wage reduction.

[7] Both parties agree that no one under 40 years of age could have even theoretically been included within the "retiree-applicant" class. (*See* Dkt. # 21 at 4-5.) Nonetheless, Defendant argues that discriminatory intent cannot be inferred from the company's decision to reduce

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appears that this showing is sufficient to survive summary judgment.

B. Disparate Impact

Unlike a disparate treatment claim, a discrimination claim alleging disparate impact "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Hazen Paper,* 507 U.S. at 609 (quoting *Teamsters,* 431 U.S. at 335-36 n.15).

To establish a *prima facie* case of discrimination using a disparate impact theory, a plaintiff must; (1) identify a specific employment practice being used by the employer; and (2) demonstrate that the challenged practice causes an adverse effect on his protected group, typically using statistical evidence. *Abbott,* 912 F.2d at 872. If the plaintiff establishes a *prima facie* case, the defendant must then articulate a legitimate, non-discriminatory reason for the challenged employment practice. *Id.* Once a defendant has articulated such a reason, the burden returns to the plaintiff to demonstrate either that the employer's proffered reason

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SKF pension recipients' pay, citing *Hazen Paper, supra,* and *Lyon, supra.* While it is certainly true that plaintiffs ordinarily cannot sufficiently establish intent from a mere disparate effect upon workers, *Lyon,* 53 F.3d at 139-40, both *Hazen Paper* and *Lyon* are distinguishable because the present case involves a situation where the affected employees – and indeed the theoretically affected employees – are *all* within the protected class. Thus, although discriminatory animus cannot be inferred from a mere disparate impact, such animus can be inferred from an action whose effect lies *solely* with members of a protected class.

was a pretext for discrimination, or that there exists an alternative employment practice that also serves the employer's legitimate interests without the disparate impact. *Id.*

As with the disparate treatment theory, Plaintiffs have established their *prima facie* case, and Tyson has articulated a legitimate, nondiscriminatory reason for its decision. Additionally, much as in the disparate treatment context, Plaintiffs have demonstrated sufficient evidence of pretext. There are genuine issues of material fact and the cross motions for summary judgment must be denied.

This is the 30 day of December, 2002.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: Counsel /s/ Hopson & Ledford
/s/ Kilgore
/s/ Kimball
/s/ Roark & Hayward

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:01 CV-175-R

CHARLES MAYO ACREE, et al. PLAINTIFFS

v.

TYSON BEARING COMPANY, INC. DEFENDANT

ORDER

Upon the parties' cross-motions for summary judgment (Dkt. Nos. 17 & 19), Plaintiff's motion for oral arguments (Dkt. # 23), and the Court being otherwise sufficiently advised,

IT IS ORDERED that the motions are **DENIED**.

This is the 30 day of December, 2002.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: Counsel /s/ Hopson & Ledford
/s/ Kilgore
/s/ Kimball
/s/ Roark & Hayward

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
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v.

TYSON BEARING COMPANY, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on the parties' cross-motions to reconsider the Court's Order of December 30, 2002 denying summary judgment to both parties (Dkt. # 37). (Dkt. Nos. 46 & 53). Plaintiffs contend that they have presented direct evidence of discrimination justifying summary judgment in their favor. (Dkt. # 46.) Defendant argues (1) that Plaintiffs have shown insufficient evidence of discriminatory intent to allege a cognizable disparate treatment age discrimination claim, (2) that no disparate impact age discrimination cause of action exists, and (3) that Plaintiffs' claims are preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). (Dkt. # 53.) For the reasons that follow, Plaintiffs' motion (Dkt. # 46) is **DENIED** and Defendant's motion (Dkt. # 53) is **GRANTED IN PART** and **DENIED IN PART.**

DISCUSSION

I. Plaintiffs' Motion

Direct evidence of discriminatory intent is "evidence which, if believed, would prove the existence of a fact without inference or presumption." *Carter v. Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989). Direct evidence is

"conduct or statements by persons involved in the decisionmaking proces that may be viewed as directly reflecting the alleged discriminatory attitude." *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) (quoting *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992)). This evidence "leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it." *Id.* at 1097. For example, racial slurs could be direct evidence of discrimination in racial discrimination cases. *See, e.g., Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1249 (6th Cir. 1995). Here, there are no age-disparaging comments, admissions that ageism fuels employment decisions, or anything similar that could constitute direct evidence of age animus. Plaintiffs' contention to the contrary misunderstands the nature of direct proof.

II. Defendant's Motion

A. Preemption

Defendant's arguments for LMRA preemption are not well-founded. The present claims – created by the Kentucky Civil Rights Act ("KCRA") – do not involve interpretation of the collective bargaining agreement. Instead, Plaintiffs' claims merely involve determining whether the actions taken by the Defendant, which both parties agree are authorized by the contract, discriminate against Plaintiffs based upon age and thus violate the KCRA. Resolution of these claims in no way require an interpretation of the collective bargaining agreement.

B. Disparate Impact

A plaintiff's ability to recover for age discrimination based upon a disparate impact theory is far from settled. No court has expressly addressed this question with regard to the KCRA. Analyzing the ADEA,[1] the Supreme Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), cast some doubt upon the availability of a disparate impact theory in age discrimination cases by stating that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Id.* at 610 (citation omitted). Much of the language of the opinion, whose focus was a disparate treatment theory of recovery, discussed the policy behind the ADEA as being one rooted in preventing *intentional* discrimination. *Id.* at 610-13. Additionally, a three-justice concurrence cautioned that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory," and stated that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Id.* at 618 (Kennedy, J., concurring, joined by Rehnquist, C.J., and Thomas, J.).

Following the *Hazen Paper* decision, three circuit courts of appeals have continued to recognize the disparate impact theory in the ADEA context, *Smith v. Xerox Corp.*, 196 F.3d 358, 367 (2d Cir. 1999); *Smith v. City of Des Moines*, 99 F.3d 1466,1469-70 (8th Cir. 1996);[2] *EEOC*

[1] The age discrimination proscription of the KCRA is typically interpreted to mirror the ADEA. *See Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984).

[2] The continued viability of the Eighth Circuit's decision in *City of Des Moines* is somewhat in doubt in light of a subsequent Eighth

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v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993), while four have rejected the theory's viability, *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1324-26 (11th Cir. 2001) (2-1 decision); *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-10 (10th Cir. 1996); *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994). In addition, minority opinions in the Third and Fifth Circuits have expressed hostility toward use of the disparate impact theory in the ADEA context. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1003-04 (5th Cir. 1996) (en banc) (DeMoss, J., concurring in part and dissenting in part, joined by Smith and Barkstale, JJ.); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (Greenberg, J., concurring). The Sixth Circuit has twice recognized this uncertainty, but has yet to decide the issue. *See Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1048 & n.6 (6th Cir. 1998); *Lyon v. Ohio Educ. Ass'n & Professional Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995). The *Lyon* court, while recognizing that past Sixth Circuit precedent allowed ADEA disparate impact recovery, opined that "[t]he Court's focus in *Hazen Paper* on Congress's intent to prevent discrimination based on inaccurate and damaging stereotypes suggests that incidental discriminatory effects arising from facially age-neutral policies are not redressable." *Lyon*, 53 F.3d at 139 n.5. This language has led several courts and commentators to conclude that a disparate impact theory is unavailable in the Sixth Circuit. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164

Circuit decision expressly calling *City of Des Moines* into question and stating that the Circuit has yet to engage in a full analysis of the disparate impact theory in light of *Hazen Paper*. *See Allen v. Entergy Corp., Inc.*, 193 F.3d 1010, 1015 n.5 (8th Cir. 1999).

F.3d at 701; *Ellis*, 73 F.3d at 1009; Erwin Chemerinsky, *Can Plaintiffs Make Disparate-Impact Claims in Age Discrimination Cases?*, Trial, May 2002, at 72 & n.6. The Supreme Court agreed to decide the issue in late 2001, *see Adams v. Fla. Power Corp.* ___ U.S. ___, 122 S. Ct. 643 (2001), but dismissed the case following briefing and oral argument, saying that certiorari had been "improvidently granted." Chemerinski, *supra*, at 72; *see Adams v. Fla. Power Co.*, ___ U.S. ___, 122 S. Ct. 1290 (2002) (per curiam).

An analysis of whether a disparate impact theory may be grounds for recovery under the ADEA must begin with the relevant statutory language. 29 U.S.C. § 623(a) provides that

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

29 U.S.C. § 623(a)(1)-(2). This provision is nearly identical to the prohibitions of Title VII of the Civil Rights Act of 1964 and the KCRA. *See* 42 U.S.C. 2000e-2(a); K.R.S. § 344.040(1)-(2); *see also Adams*, 255 F.3d at 1324.

The Supreme Court has held that Title VII supports a cause of action for employment discrimination based upon a disparate impact. *See Griggs v. Duke Power Co.*, 401 U.S.

424, 431-32 (1971). Thus, in the Title VII context, the "because of" language in the statute's prohibitive language does not prohibit only intentional discrimination; rather, it means that there must be a causal connection between the protected characteristic and the challenged action. Jennifer J. Clemons and Richard A. Bales, *ADEA Disparate Impact in the Sixth Circuit*, 27 Ohio N.U.L. Rev. 1, 20 (2000). It logically follows, under the doctrine of *in pars materia*,[3] that the ADEA and KCRA's nearly identical use of "because of" would have the same meaning. *Id.* However, the Supreme Court pointed to this "because of" language in the ADEA in support of the contention that "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear." *Hazen Paper*, 507 U.S. at 609. Some courts of appeals have also read the "because of language" to prohibit only intentional discrimination. *See, e.g., Ellis*, 73 F.3d at 1007.

The text of the ADEA differs from the text of Title VII and the KCRA in one significant respect, however. Section 623(f)(1) of the ADEA explicitly allows an employer "to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Neither Title VII nor the KCRA provide for such an exemption. In evaluating the effect of the ADEA's "reasonable factors" exemption, the First Circuit has reasoned that

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[3] Under this canon of statutory construction, related statutes "may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." Black's Law Dictionary (7th ed. 1999).

> if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination." Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction].

Mullin, 164 F.3d at 702.

Similarly, the Equal Pay Act carries like language allowing wage differentials between men and women when the differentials are "based on any other factor other than sex." 29 U.S.C. § 209(d)(1)(iv). The Supreme Court has interpreted this exception to preclude disparate impact claims. *County of Washington, Ore. v. Gunther*, 452 U.S. 161, 170-71 (1981). While some courts reason that the Court's ruling in the Equal Pay Act context foretells a similar ruling in the ADEA context, *see, e.g., Ellis*, 73 F.3d at 1008, others find the ADEA's allowance of decisions based on "reasonable factors" and the Equal Pay Act's exception for actions based on "any other factor" significantly dissimilar to justify a different result, *see, e.g., Adams*, 255 F.3d at 1327-28 (Barkett, J., concurring); Clemons & Bales, *supra*, at 21-22. Either way, § 623(f)(1) provides at least some level of distinction between the ADEA and Title VII, making "[t]he text of the ADEA . . . sufficiently distinguishable from Title VII as to raise doubts about extending the disparate impact theory of liability to ADEA cases." *Adams*, 255 F.3d at 1325.

The Supreme Court has opined that

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

> "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact. . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers."

Hazen Paper, 507 U.S. 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231(1983)). By contrast, the Supreme Court discerned Congress's objective in enacting Title VII as seeking "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30. Thus, the ADEA was enacted to prevent present discrimination, while Title VII was intended to prevent present discrimination *and* remedy past discrimination. It logically follows that because age discrimination does not have a similar history as does race discrimination, the ADEA does not have the same remedial purpose as Title VII – making a disparate impact cause of action is unnecessary. *See* Miles F. Archer, Note, *Mullin v. Raytheon Company: The Threatened Vitality of Disparate Impact Under the ADEA*, 52 Me. L. Rev. 149, 168 (2000).

Further support for this position comes from the Supreme Court's discussion of the ADEA in *Hazen Paper*. In that case, the Court stated, albeit in the disparate treatment context, that "the essence of what Congress sought to prohibit in the ADEA" was intentional discrimination based on inaccurate stereotypes. *Hazen Paper*, 507 U.S. at 610. This overarching goal is not furthered by allowing a disparate impact theory of recovery: while proof

of discriminatory motive is critical in the disparate treatment context, demonstrating such a motive is not even required in the disparate impact context. *Hazen Paper*, 507 U.S. at 609 (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)).

Moreover, Congress explicitly added a disparate impact cause of action to Title VII in 1991, but added no such parallel provision to the ADEA, despite amending other portions of the ADEA at that time. *Compare* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991), *with id.* at § 115, 105 Stat. at 1079, *and id.* at § 302(2), 105 Stat. at 1088. *See also Ellis*, 73 F.3d at 1008.

Given the differences between Title VII and the ADEA, *Hazen Paper's* apparent disfavor of the disparate impact theory, the clear trend among the courts of appeals toward concluding that the ADEA does not support a disparate impact claim,[4] and the Sixth Circuit's questioning of the disparate impact ADEA cause of action, the Court concludes that there can be no recovery in this circuit under the ADEA based upon a disparate impact theory of age discrimination.

This determination does not, however, necessarily decide whether a disparate impact claim is allowed for age discrimination prohibited by the KCRA. As previously noted, the KCRA, unlike the ADEA, does not exempt

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[4] The three courts that have endorsed a disparate impact theory post-*Hazen Paper* have done so with very little analysis or discussion, while the courts rejecting the theory have engaged in a thorough exploration of the pertinent issues. This seems to indicate that the court seriously considering the issue have all reached the same conclusion – disparate impact age discrimination is not cognizable under the ADEA.

otherwise prohibited conduct that is based upon "reasonable factors other than age." Nonetheless, one of the KCRA's general purposes is "[t]o provide for execution within the state of policies embodied in . . . the Federal Age Discrimination in Employment Act of 1967." K.R.S. § 344.020(1)(a). Because the ADEA does not allow a disparate impact claim, the KCRA, to effectuate the ADEA's policies, must also decline to allow a disparate impact claim. *See Harker*, 679 S.W.2d at 229 (KCRA's age discrimination proscription typically interpreted to mirror the ADEA). For this reason, the KCRA does not allow a disparate impact age discrimination claim. Defendant is therefore entitled to summary judgment upon the Plaintiffs' disparate impact claims.[5]

C. Disparate Treatment

Defendant also assails Plaintiffs' disparate treatment claim, arguing that Plaintiffs have not presented sufficient evidence from which a reasonable factfinder could infer

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[5] In their response and cross-motion for summary judgment (Dkt. # 19), Plaintiffs seem to concede that no disparate impact cause of action exists: "Plaintiffs recognize that most courts have indeed held that proof of a disparate impact of an employer's practice or policy, without more, probably will not serve conclusively to prove age, as opposed to other, forms of discrimination." (*Id.* at 15.) Later in the same document, Plaintiffs again seemingly concede the issue by stating that "[e]ven if the Defendant is correct that an age discrimination plaintiff may not solely rely upon a disparate impact analysis to prove his case without proof of intentional discrimination, as may sex and race discrimination plaintiffs, he may rely upon it ro [sic] prove intentional discrimination under a circumstantial proof model." (*Id.* at 17.) Similarly, Plaintiffs make no mention of a disparate impact theory in their reply (Dkt. # 24). Indeed, nowhere do Plaintiffs directly argue that they may recover simply by proving a disparate impact. This apparent abandonment of a disparate impact mode of recovery would also justify summary judgment in Defendant's favor.

intent to discriminate. Under a disparate treatment theory of discrimination, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper*, 507 U.S. at 610. "[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.* However, proof of discriminatory motive may "be inferred from the mere fact of differences in treatment" *Id.* at 609 (quoting *Teamsters*, 431 U.S. at 335-36 n.15).

Because Defendant seeks summary judgment, the Court must resolve all ambiguities and thaw all reasonable inferences in Plaintiffs' favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In this light, Plaintiffs have presented proof that Defendant Tyson unilaterally decided to make the "retiree-applicant" designation and concomitant wage and benefits reduction, telling the Union representatives that they could either accept the reduction or the firing of all SKF employees followed by a selective rehire. While Defendant avers that the wage and benefits reduction was necessary to cut costs, it has provided no determinative justification for choosing the particular group targeted for reduction.[6]

Likewise, the mere fact that the "retiree-applicant" designation affected some, but not all, employees protected

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[6] If believed, Defendant's assertion that the category choice resulted from the Union's suggestion provides a legitimate, nondiscriminatory reason for the selection. However, Plaintiffs have presented evidence tending to show that it was the Defendant, not the Union, that insisted upon the "retiree-applicant" designation and reduction. Plaintiffs' evidence creates a jury issue as to pretext.

by the KCRA's age provision does not change this result. Neither the ADEA nor the KCRA requires that an employer discriminate against *all* protected individuals; rather, each only requires that the employer discriminate against *any* protected individual because of that individual's age.

Finally, the result is not changed by the fact that all employees, regardless of age, who began work after March 31, 1996 were hired at a lower rate of pay and with less benefits than their previously-hired counterparts. First, these employees never had their salaries or benefits cut, but merely began work under these conditions. Second, these wage and benefits reductions were made over three years prior to the decision at issue by an entirely different company, SKF. Thus, Tyson came into control of the plant with the March 31, 1996 reductions already in place, and the company had absolutely nothing to do with their enactment. Tyson cannot now claim that the prior reduction sufficiently dilutes the discriminatory effect of its decision or somehow provides justification for singling out a protected class for different treatment. While there is substantial evidence that Tyson's decision to reduce the pay and benefits of the "retiree-applicants" was merely a business decision unmotivated by the group's age, there is also significant evidence from which a jury could infer that Tyson intentionally discriminated against the class because of their age. There are therefore genuine issues of material fact as to Plaintiffs' disparate treatment claims, and Defendant's motion to reconsider these claims must be denied.

This is the 7 day of February, 2003.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:01 CV-175-R

CHARLES MAYO ACREE, et al. PLAINTIFFS

v.

TYSON BEARING COMPANY, INC. DEFENDANT

ORDER

Upon the parties' cross-motions to reconsider (Dkt. Nos. 46 & 53) and the Court being otherwise sufficiently advised,

IT IS ORDERED:

Plaintiffs' motion to reconsider (Dkt. # 46) is **DENIED**.

Defendant's motion to reconsider (Dkt. # 53) is **GRANTED** as to Plaintiffs' disparate impact claims, but **DENIED** as to Plaintiffs' disparate treatment claims.

This is the 7 day of February, 2003.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: Counsel

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

CHARLES M. ACREE, ET AL

V.

TYSON BEARING COMPANY, ET AL

JUDGMENT IN A CIVIL CASE

Case Number: 1:01CV-175-R

x **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

❑ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that plaintiffs have and recover nothing of the defendants.

THIS IS A FINAL AND APPEALABLE JUDGMENT AND THERE IS NO JUST CAUSE FOR DELAY.

/s/ Thomas B. Russell
THOMAS B. RUSSELL, Judge
United States District Court

February 13, 2003
Date

JEFFREY A. APPERSON
Clerk

/s/ Lynne Lyons
(By) Deputy Clerk

cc: /s/ Hopson /s/ Hayward
/s/ Kilgore
/s/ Ledford
/s/ Kimball
/s/ Roark

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:01 CV-175-R

CHARLES MAYO ACREE, et al. PLAINTIFFS

v.

TYSON BEARING COMPANY, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on Plaintiffs' motion for judgment as a matter of law or, in the alternative, for a new trial (Dkt. # 66). Defendant has responded to Plaintiffs' motion (Dkt. # 67), and this matter is now ripe for review. For the reasons that follow, Plaintiffs' motion (Dkt. # 66) is **DENIED**.

DISCUSSION

I. Judgment as a Matter of Law

Judgment as a matter of law is only appropriate if, viewing the evidence in the light most favorable to the nonmovant, there is no genuine issue of material fact for the jury, and reasonable minds could only find in favor of the movant. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). Deciding upon a motion for judgment as a matter of law requires that a court review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmovant. *Id.* at 600 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000)). The reviewing court is to make no credibility determinations and weigh no evidence. *Id.*

In seeking judgment as a matter of law, Plaintiffs argue that the Memorandum of Agreement was facially discriminatory against the class of employees protected by the age discrimination prohibition of the Kentucky Civil Rights Act. As such, they maintain, this discriminatory effect provides conclusive proof of discriminatory intent.

Plaintiffs have twice raised this argument, which the Court has both times rejected. The fact that the wage reduction affected only members of the protected class permits, but does not require, an inference of discriminatory animus. The jury was free to conclude that Defendant had no discriminatory intent, which they did. A holding to the contrary would convert Plaintiffs' disparate treatment claim into one for disparate impact. Plaintiffs' motion for judgment as a matter of law is not well-founded and must be denied.

II. New Trial

Plaintiffs argue that a new trial is warranted because the jury's verdict was against the weight of the evidence and because of judicial errors that took place during the trial and prejudiced them. *See Smith v. Louis Berkman Co.*, 894 F. Supp. 1084, 1094 (W.D. Ky. 1995) ("Grounds for a new trial include judicial error, an event occurring during trial that unduly prejudiced the moving party, or a verdict clearly against the weight of the evidence.").

The Court is unpersuaded that the jury's verdict was against the weight of the evidence. The only evidence that the pay reduction was motivated by discriminatory animus was the reduction's discriminatory impact. As previously explained, this evidence allowed, but did not require, an inference of discriminatory intent. Further, Defendant

presented evidence that it harbored no discriminatory animus. Under these circumstances, a new trial is unwarranted.

Plaintiffs also contend that the Court committed two prejudicial errors. First, Plaintiffs aver that certain testimony from Michael S. Gostomski, Executive Vice President of Tyson, was inadmissible hearsay. Second, Plaintiffs allege the Court erred when it dismissed their disparate impact theory of age discrimination.

At trial, Mr. Gostomski testified that Joe Villines, Staff Representative for the Union, both suggested and agreed to the portions of the Memorandum of Agreement that caused the wage and vacation benefits reductions at issue here. The Court cannot agree with Plaintiffs that admission of this testimony was error. First, the statements were admissible non-hearsay used to show the state of mind of the hearer. Whether or not the selective reductions would be agreeable to the Union members is immaterial; Mr. Villines's statement that the Union would not accept the across-the-board reductions but would allow a selective reduction was not used to prove the truth of that statement, but to show the Defendant's state of mind in adopting the proposal. This statement, having a bearing on the intent underlying Defendant's subsequent conduct, is admissible. *See McCormick on Evidence* § 249 (5th ed. 2003); *see also United States v. Bartle*, 835 F.2d 646, 651-52 (6th Cir. 1987) (declarant's statement to woman that defendant needed to marry an American woman to remain in the U.S. was admissible nonhearsay in that they showed woman's state of mind going into marriage with the defendant). Second, the statements constituted part of the verbal act of contract offer and acceptance that is excluded from the definition of hearsay. *See Preferred*

Properties, Inc. v. Indian River Estates, Inc., 276 F.3d 790, 798 n.5 (6th Cir. 2002) ("The verbal acts doctrine applies where 'legal consequences flow from the fact that words were said, *e.g.* the words of offer and acceptance which create a contract.'" (quoting Black's Law Dictionary 1558 (6th ed. 1990))). Third, even assuming that the statements were otherwise inadmissible hearsay, they would be admissible either as a statement by the Plaintiffs' agent concerning a matter within the scope of the agency made during the existence of the relationship, *see* Fed. R. Civ. P. 801(d)(2)(D), or as a statement by a person authorized by the Plaintiffs to make a statement concerning the subject, *see* Fed. R. Civ. P. 801(d)(2)(C).

In addition, the Court rejects the Plaintiffs' second contention – that the disparate impact cause of action should not have been dismissed – for the reasons set forth in its Memorandum Opinion of February 7, 2003 (Dkt. # 61). Plaintiffs are not entitled to a new trial.

This is the 5 day of ~~April~~ June, 2003.

/s/ Thomas B. Russell

Thomas B. Russell, Judge
United States District Court

cc: Counsel

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:01 CV-175-R

CHARLES MAYO ACREE, et al. PLAINTIFFS

v.

TYSON BEARING COMPANY, INC. DEFENDANT

ORDER

Upon Plaintiffs' motion for judgment as a matter of law or, in the alternative, for a new trial (Dkt. # 66), and the Court being otherwise sufficiently advised,

IT IS ORDERED:

Plaintiffs' motion (Dkt. # 66) is **DENIED**.

This is a final and appealable order. There is no just cause for delay.

This is the 5 day of ~~April~~ June, 2003.

/s/ Thomas B. Russell

Thomas B. Russell, Judge
United States District Court

cc: Counsel

Hopson
Kilgore
Ledford
Kimball
Roark
Hayward

Nos. 03-5870/5946

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES MAYO ACREE, et al., Plaintiff-Appellant, Cross-Appellee,	)
v.	) 01CV175
TYSON BEARING COMPANY, INC., Defendant-Appellee, Cross-Appellant.	) ORDER) (Filed Dec. 15, 2003)

Before: ROGERS and COOK, Circuit Judges; COHN, District Judge.*

This is a diversity action in which the jury returned a verdict for the defendant. The plaintiff appealed and that appeal was docketed with this court as Case No. 03-5870. The defendant filed a notice of cross-appeal seeking review of a pre-trial order dismissing its third-party complaint against the plaintiffs' union. That appeal was docketed as Case No. 03-5946. Because the notice of cross-appeal was filed beyond the time limits of Rule 4(a)(3), Fed. R. App. P., the clerk of this court issued an order on August 15, 2003, directing the defendant to show cause why its cross-appeal should not be dismissed for lack of appellate jurisdiction.

In response to the show cause order, the defendant returned to the district court with a motion for an extension of time to file its notice of appeal under Rule 4(a)(5), Fed. R. App. P. The district court, however, denied that motion

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

in an order entered on October 14, 2003. The defendant thus having failed to show cause for the untimeliness of its notice of cross-appeal,

It is **ORDERED** that Case No. 03-5946 is dismissed *sua sponte* for lack of appellate jurisdiction. This order shall have no effect upon the appeal in Case No. 03-5870.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

No. 03-5870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES MAYO ACREE, ET AL., Plaintiffs-Appellants, v. TYSON BEARING COMPANY, INC., Defendant-Appellee.	)	ORDER (Filed Apr. 25, 2005)

BEFORE: BOGGS, Chief Judge; GILMAN, Circuit Judge; and SARGUS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* Hon. Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

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March 30, 2005

Clerk, U.S. Court of Appeals
Sixth Circuit
Potter Stewart U.S. Courthouse
100 E. 5th Street
Room 532
Cincinnati, Ohio 45202

RE: *Acree, et al. v. Tyson Bearing Co., Inc.*, No. 03-5870

Dear Clerk:

Pursuant to FRAP 28(j), I am notifying the Court of Appeals of a pertinent and significant authority that supplements the arguments of my clients, the Appellants/Petitioners for Rehearing, Charles Acree and others at Pages 43-48 of their original Brief. In addition, the cited authority relates to the analysis in the panel opinion filed on February 11, 2005 at Pages 19-23 of the panel opinion.

The cited opinion is: *Azel P. Smith, et al. v. City of Jackson, Mississippi, et al.*
No. 03-1160
544 US ___(2005)
Entered March 30, 2005
Available at: *http://www.supremecourtus.gov/*

Thanks for your consideration in this matter.

Sincerely,

/s/ Philip C. Kimball
PHILIP C. KIMBALL

PCK/cn
cc: Ed Hopson, Esq.

(3)

No. 05-135

Supreme Court, U.S.
FILED
AUG 23 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHARLES MAYO ACREE, *et al.*,

Petitioners,

v.

TYSON BEARING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals err in affirming the district court's judgment for Respondent on Petitioners' claim for age discrimination brought under the Kentucky Civil Rights Act, where the central question is whether collectively bargained provisions applicable to Petitioners were per se discriminatory under Kentucky law?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Tyson Bearing Company, Inc., is a wholly owned subsidiary of Roller Bearing Company of America, Inc., which is a wholly owned subsidiary of RBC Bearings Incorporated, which is a publicly held company. No other publicly held company owns 10% or more of Tyson Bearing Company, Inc. or Roller Bearing Company of America, Inc. or RBC Bearings Incorporated stock.

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INTRODUCTION

Petitioners erroneously list under "Statutory Provision Involved" on page 2 of their Petition for a Writ of Certiorari ("Petition") the federal Age Discrimination in Employment Act of 1967, as amended ("ADEA"). The instant case from the very beginning has been an action filed and pursued exclusively under the Kentucky Civil Rights Act, KRS 344, *et seq*. The lower courts' jurisdiction was based on diversity, not any question of federal law. See Petition 8-9. There is no conceivable conflict among the Circuit Courts of Appeal since the questions involved here involve exclusively Kentucky state law.

In the district court, Petitioners' primary claims were tried to a jury and the jury found for Respondent, Tyson Bearing Company, Inc. On appeal to the U.S. Court of Appeals for the Sixth Circuit, Petitioners raised all the same assertions of error it now raises in this Court. The Sixth Circuit in a detailed opinion affirmed the district court in all respects, in an unpublished opinion. Petition Appendix 1-30.[1]

STATEMENT OF THE CASE

In this action Petitioners alleged that the application of a collectively bargained agreement between Respondent and Petitioners' union, the United Steelworkers of America, AFL-CIO ("Union"), covering Respondent's Glasgow, Kentucky facility, violated the Kentucky Civil Rights Act's

[1] References herein to "Petition Appendix ___" refer to the documents appended to Petitioners' Petition for Writ of Certiorari.

prohibition of discrimination against persons on the basis of age (forty (40) and over). In the district court, Petitioners chose not to join the Union as a party and Respondent's attempt to do so was rejected by the district court. Petition Appendix 2, 31-33.

Effective June 11, 1999, Respondent purchased the Tapered Bearing Division from SKF-USA, Inc. ("SKF") at Glasgow, Kentucky. The SKF Tapered Bearing Division had previously experienced financial difficulties. In February, 1999, it was announced that Respondent's parent, Roller Bearing Company of America, Inc., had stepped forward as a potential buyer to take over and continue operating the tapered bearing business in the same facility SKF had been occupying. Respondent negotiated with the Union over what their terms and conditions of employment would be at the new operation. It also negotiated financial concessions from suppliers, subcontractors, and SKF-salaried employees. It was understood that once Respondent took over the operation, it would be forced to reduce the employee roster from about 260 employees represented by the Union to 130 employees. Petition Appendix 2-3.

During the negotiations between the Union and Respondent, Mike Gostomski in behalf of Respondent offered a $5.00 per hour across-the-board wage reduction for all employees represented by the Union. That was not acceptable to the Union and, eventually, the parties agreed upon the concept of allowing the SKF retirees to work at Respondent as if they were new hires under the two-tier system contained in the existing agreement between SKF and the Union. Under that existing two-tier system, employees hired after March 31, 1996, earned $3.00 per hour less than employees hired on or before March 31,

1996, and received a maximum of two weeks' vacation, while the others earned more.[2] The Memorandum of Agreement portion of the labor agreement challenged by Petitioners in this action resulted. Petition Appendix 3-4.

The Memorandum of Agreement was incorporated into the then-current three-year collective bargaining agreement between SKF and the Union and was ultimately assumed by Respondent effective June 11, 1999. The Memorandum of Agreement provided, in part:

> It is contemplated . . . that certain members of the bargaining unit, currently employed by SKF, will retire under the SKF Pension Plan, prior to the closing date, pursuant to the 30-Year Retirement without actuarial reduction option (including these employees who are eligible to age into such option pursuant to the 1999 amendments to

[2] Although second-tier employees made $3.00 less per hour, it was felt that with the reduced wage, plus the SKF retirement benefit, the Petitioners would actually take home more money than before. Additionally, the Union was able to bargain from Respondent that retiree-applicants would receive a number of benefits not available to second-tier new employees, including that they (1) would be assigned to the same position they held at SKF; (2) would *not* have to serve another probationary period; (3) would be eligible for insurance benefits as if they had been employed prior to March 27, 1993; (4) would maintain their original seniority date from SKF for purposes of layoff, recall, transfers, filling of vacancies, and other such non-economic provisions of the Agreement; (5) would be entitled to two weeks of vacation and would be eligible for increased vacation if certain production cost levels were reached; (6) would be entitled to a monthly additional payment of $150 if they opted out of single medical coverage, or $250 if they opted out of married with or without dependents medical insurance coverage; (7) would be entitled to certain wage increases based on Respondent production costs in the future; and (8) would not be required to take a medical examination to qualify for employment with Respondent. Petition Appendix 4-5.

> the labor contract) described in a Memorandum of Understanding between SKF and the Union or pursuant to an Early Retirement option with actuarial reduction, based on age 55 years or older and at least 10 years of service, and will thereafter confirm to the Company that they are available for immediate employment in a Tyson Bearing Bargaining Unit position at the Tyson Bearing Glasgow facility after the closing date. The parties have agreed that such retirees (hereafter "retiree-applicants") will be employed by the Company subject to certain terms and conditions that differ from the terms and conditions generally applicable under the labor contract.

Petition Appendix 4-6.

Respondent agreed not only to transfer active SKF employees to its payroll but also agreed to hire then-current SKF employees who had retired from SKF prior to the closing date. Some SKF employees over the age of 40 and eligible for retirement did not retire and were transferred to Respondent with no reduction in wages or vacation. There were 79 retiree-applicants as of June 11, 1999, who became employed by Respondent. Of these, 49 sued Respondent in the instant action. Petition Appendix 4-5.

Prior to filing suit, on July 15, 1999, a grievance was filed by some of Petitioners under the labor agreement asserting the treatment of retiree-applicants was a violation of that agreement. The grievance was processed through the grievance procedure, but it was not taken to arbitration. On August 29, 2001, the Petitioners filed their Complaint in state court alleging age discrimination in violation of the Kentucky Civil Rights Act and pled both "disparate impact" and "disparate treatment" theories of recovery. Respondent removed the lawsuit to the U.S.

District Court, Western District of Kentucky at Bowling Green. Petition Appendix 6.

After both parties filed dispositive motions, the district court ultimately dismissed the disparate impact portion of the case finding that the Kentucky Civil Rights Act did not recognize such a theory of recovery. The district court also noted that Petitioners had waived their disparate impact claim, in any event. The court allowed the disparate treatment claim to go to trial. Petition Appendix 6-7.

After a trial, the jury returned a verdict in favor of Respondent. Following denial of various post-trial motions, Petitioners appealed to the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals, in an unpublished opinion, affirmed the district court. Petitioners' request for rehearing en banc was subsequently denied by the Court of Appeals. Petition Appendix 8, 67.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any court of appeals. In addition, the points raised in their Petition lack merit under Kentucky law.

I. Petitioners' Request for a Writ Meets None of the Tests Set Forth in Rule 10 of the Supreme Court's Rules.

Petitioners' request for relief meets none of the tests set forth in Rule 10 of the Rules of the Supreme Court of the United States, "Considerations Governing Review of Certiorari." The first of these tests applies when a Court of

Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals, or has decided an important federal question in a way which conflicts with the decision of a state court of last resort, or "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." There is clearly no conflict between Courts of Appeal in this case, nor do Petitioners claim that the Court of Appeals for the Sixth Circuit has decided a federal question in a way which conflicts with a state court of last resort.[3] In addition, it cannot be seriously claimed that the Court of Appeals departed from the accepted and usual course of judicial proceedings.

Petitioners' effort to rely on Supreme Court Rule 10(c) likewise has no application to this case. The Court of Appeals here has not decided an important question of federal law which should be settled by this Court, or decided a federal question in a way that conflicts with applicable decisions of this Court. This case merely involves a fact-intensive decision together with an interpretation of a state civil rights statute, the Kentucky Civil Rights Act, KRS 344.010, *et seq.* Moreover, the Kentucky Supreme court has never expressly addressed whether a disparate impact theory of recovery for age-based discrimination is available under the Kentucky law.

Petitioners argue the issue presented is of the "greatest national importance," Petition 14, and attempt to

---

[3] Petitioners acknowledged that "[t]his case does not involve a conflict of law within this Circuit or among the Circuits" in their Sixth Circuit Civil Appeal Conference Statement served July 21, 2003, a copy of which is attached hereto in the Appendix.

sidestep the fact that this case deals only with state-law claims under the Kentucky Civil Rights Act, not any federal claims under the ADEA, by alleging that this case has the "same precedential value as though it were . . . litigated under the ADEA." Petition 16. Petitioners' argument should be ignored for what it is – an inaccurate description of the true nature of this case.

For these reasons alone, Petitioners' Petition should be denied.

II. Petitioners' Assertion That the Collectively Bargained Agreement Which Treated Them as New Employees Was Per Se Discriminatory Under the Kentucky Civil Rights Act Lacks Merit.

Petitioners' claim that the collectively bargained agreement under which they were employed by Respondent was facially discriminatory. That claim was, in fact, tried to a jury and the jury decided it was not. Petitioners contend that the district court should have directed a verdict in their favor on this question at trial. The district court correctly refused to direct a verdict in Petitioners' favor and did not grant Petitioners' judgment notwithstanding the verdict and motion for a new trial. The Court of Appeals also properly dealt with this contention, stating:

> Plaintiffs misapprehend the nature of direct proof necessary to sustain their claim in a disparate treatment case. * * * Plaintiffs point to no evidence that Tyson deliberately selected them and intended to discriminate against them on the basis of age. Importantly, Plaintiffs voluntarily chose to retire from SKF prior to the takeover by

> Tyson. Other than pointing to the policy itself, Plaintiffs offer no evidence to suggest that discrimination was at least a motivating factor.

Petition Appendix 15. The Kentucky law provides:

> **344.100. Discrimination in wages or conditions not unlawful when made on basis other than . . . age forty and over. . . .**
>
> Notwithstanding any other provision of this chapter, it is not an unlawful practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . *if the differences are not the result of an intention to discriminate* because of . . . age forty (40) and over. . . ." (Emphasis added).

Thus, in a disparate treatment case under Kentucky law, the plaintiff must put forth some evidence that the protected trait, such as age, was intentional and a motivating factor in the employment decision about which the plaintiff complains. See also, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Petitioners failed to present any such evidence, and the jury and lower courts have consistently rejected their claim. The jury was presented with evidence that Respondent's collectively bargained agreement with Petitioners' Union was intended to make a company that had been losing money viable economically so as to preserve jobs and continue in operation. Petition Appendix 17-18. The Court of Appeals noted that there can be no disparate treatment when a company bases its decision on factors only "empirically correlated with age, such as pension status, seniority, or wage rate. *Hazen Paper*, 507 U.S. at 609. . . . " See also, *General Dynamics Land Sys.*,

Inc. v. Cline, 124 S.Ct. 1236, 1244 (2004). The Court of Appeals also rejected Petitioners' argument that the collectively bargained agreement to treat SKF retirees essentially as new employees was using pension status as a "proxy for age" citing *Hazen Paper*, 507 U.S. at 612-13. It stated that:

> In this case, Plaintiffs have offered no facts or direct evidence that Tyson intended for the retiree-applicant policy to discriminate against the employees on the basis of their protected trait of age.

Petition Appendix 19.

Petitioners argue that this Court should grant its petition for a writ of certiorari because litigating a case under Kentucky law is the same as litigating it under the ADEA. That is simply not true. The Kentucky Supreme Court, while relying upon some federal cases as persuasive authority, has fashioned its own precedent when it comes to age discrimination. A case in point is *Harker v. Fed. Land Bank of Louisville*, Ky., 679 S.W.2d 226, 229 (1984), wherein the Kentucky Court established the rule that in order for a plaintiff who is bringing an age discrimination claim under Kentucky law to prevail, that plaintiff must establish "cold hard facts" that age was a motivating factor in the complained of adverse employment action. That standard is not found in the decisions of this Court under the ADEA.

Petitioners also rely heavily upon *TWA v. Thurston*, 469 U.S. 111 (1985). In *TWA*, the airline adopted a policy whereby Captains who became disqualified from serving in that position for reasons other than age automatically were able to displace less senior flight engineers. Captains

disqualified because of age were not afforded this same "bumping" privilege.[4] Instead, they had to use the bidding procedures set forth in the collective-bargaining agreement. If there was no vacancy prior to a bidding captain's 60th birthday, he had to retire. *TWA*, 469 U.S. at 120.

As noted, the TWA policy treated similarly situated employees (i.e., currently employed Captains) differently because of their age (i.e., those disqualified from service as Captain for reasons other than age automatically were able to displace less senior flight engineers, whereas those disqualified because of age were not afforded this same "bumping" privilege). However, in the case at hand, the employees treated differently (i.e., the retiree-applicants) are not similarly situated to the employees who did not terminate employment with SKF before the closing date. The agreement negotiated by the Union and Respondent and applicable to Petitioners actually treated them better than anyone else who would attempt to work at Respondent after quitting their employment at SKF. See footnote 2 supra. Therefore, *TWA* is inapplicable to the case at hand and Petitioners' reliance on the case should be disregarded.

Petitioners' petition for writ of certiorari based on its "per se" disparate treatment theory should be rejected.

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[4] When *TWA v. Thurston* was decided, Federal Aviation Administration regulations prohibited anyone from serving as a pilot on a commercial carrier after age 60. Flight engineers were not subject to the FAA regulation.

III. Petitioners Were Not Entitled to a Trial of Their Claim that the Collectively Bargained Agreement in Question Had a Disparate Impact on Them Based on Their Age.

A. Petitioners Waived Any Disparate Impact Claim.

Both the district court and the Court of Appeals noted that Petitioners had apparently abandoned their disparage impact claim at the trial court level. The district judge, in ruling on the dispositive motion filed by Petitioners before trial, stated:

> In their response and cross-motion for summary judgment (Dkt # 19), Plaintiffs seem to concede that no disparate impact cause of action exists: "Plaintiffs recognize that most courts have indeed held that proof of a disparate impact of an employer's practice or policy, without more, probably will not serve conclusively to prove age, as opposed to other, forms of discrimination." (*Id.* at 15). Later in the same document, Plaintiffs again seemingly concede the issue by stating that "[e]ven if the Defendant is correct that an age discrimination plaintiff may not solely rely upon a disparate impact analysis to prove his case without proof of intentional discrimination, as may sex and race discrimination plaintiffs, he may rely upon it to [sic] prove intentional discrimination under a circumstantial proof model." (*Id.* at 17.) Similarly, Plaintiffs make no mention of a disparate impact theory in their reply (Dkt. # 24). Indeed, nowhere do Plaintiffs directly argue that they may recover simply by proving a disparate impact. This apparent abandonment of a disparate impact mode of recovery would also justify summary judgment in Defendant's favor.

Petition Appendix 54. The Court of Appeals similarly noted that Petitioners "concede that a cause of action 'probably' does not exist under the ADEA for disparate impact claims." Petition Appendix 24, 27. The Court of Appeals went on to state:

> Further, this case arises in the context of the Kentucky Civil Rights Act, not the ADEA. The Supreme Court of Kentucky has not spoken on this important matter as it relates to its state law. For these reasons, the Court declines the opportunity to opine any further than it has in the past in *Lyon*[*v. Ohio Educ. Ass'n & Prof. Staff Union*, 53 F.3d 135 (6th Cir. 1995)] and *Gantt* [*v. Wilson Sporting Goods, Co.*, 143 F.3d 1042 (6th Cir. 1998)] given the facts presented here.

Petition Appendix 27. This Court should likewise disregard Petitioners' formerly conceded theory of recovery and not attempt to guess at what the Kentucky Supreme Court would do in such a case as this if presented to them.

B. Alternatively, Petitioners Cannot State a Claim Based on Disparate Impact.

Petitioners attempt to rely upon the recent decision in *Smith v. City of Jackson*, 544 U.S. ___, 125 S.Ct. 1536 (2005), in which the Court (5 to 3, with the Chief Justice not participating) held that a limited disparate impact theory of recovery was available under the ADEA. However, the instant case was not brought under the ADEA, but rather the Kentucky Civil Rights Act.[5]

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[5] Justice Scalia's concurrence in *Smith v. City of Jackson* was predicated upon deference to the regulations issued by the U.S. Equal

(Continued on following page)

In any event, as this Court noted in *City of Jackson*, 125 S.Ct at 1545, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *quoting Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989).

Once a claim of disparate impact is established, the case shifts to "any business justification" the employer offers for its use of the practices at issue. *Wards Cove*, 490 U. S. at 658.[6] The justification stage contains two components: (1) a consideration of the justifications an employer offers for use of the practices in question; and (2) the availability of alternative practices to achieve the same business ends, with less impact on the protected status. *Id.* At this stage, the employer has the burden of production, but not persuasion. *Id.* at 660.

Petitioners' argument that an employer must show "business necessity" is erroneous. Petition 23. As the *City of Jackson* decision clearly explains, the employer carries the burden of *producing* evidence of a business justification. The dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment

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Employment Opportunity Commission on the subject. Obviously, EEOC's regulations are not due any particular deference in the Supreme Court of Kentucky.

[6] While amendments to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071, modified this Court's holding in *Wards Cove*, the relevant 1991 amendments did not amend the ADEA or speak to the subject of age discrimination. Thus, *Wards Cove's* pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. *City of Jackson*, 125 S.Ct. at 1545.

goals of the employer. "[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ." *Wards Cove*, 490 U. S. at 659.

The ultimate burden of persuasion remains with the disparate-impact plaintiff at all times as it is the plaintiff who must prove that he was discriminated against "because of such individual's age." *Id.* at 659, citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 1232 (1988); see also 29 U.S.C. §623(a). This rule conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *Wards Cove*, at 659, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256-58 (1981).

Here, Respondent stepped in to buy a division of SKF that was failing financially. Therefore, it was imperative for Respondent's management to negotiate concessions from the Union, as well as suppliers, subcontractors, and salaried employees in order to make the acquisition viable.

With regard to the Memorandum of Agreement, various meetings were held with Union representatives, including one of the Petitioners, to negotiate concessions. During these negotiations, the parties eventually agreed upon the very terms being challenged by Petitioners. The Memorandum of Agreement allowed Respondent to reduce its operational costs and operate the business.

The Memorandum of Agreement, under which various employees were treated differently based on when they were hired and whether they ceased employment with SKF prior to the closing date, cannot be evidence of age bias without more. Likewise, the fact that all retiree-applicants described

in the Memorandum of Agreement were over the age of 40 is insufficient in and of itself to establish a claim of disparate impact. As this Court has noted in *Cline v. Gen. Dynamics Land Sys., Inc.*, 124 S.Ct. 1236, 1244 (2004):

> [In] *Hazen Paper* . . . we held there is *no* violation of the ADEA in firing an employee because his pension is about to vest, a basis for action that we took to be analytically distinct from age, even though it would never occur without advanced years. *Id.*, at 611-612. We said that 'the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age,' *id.*, at 610, whereas discrimination on the basis of pension status '*would not* constitute discriminatory treatment on the basis of age [because t]he prohibited stereotype [of the faltering worker] would not have figured in this decision, and the attendant stigma would not ensue,' *id.*, at 612. (Emphasis added).

Moreover, in both disparate treatment and disparate impact cases, the plaintiff must be able at some point to establish that the stated reason for the employer's action complained of was pretextual. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000); *Wards Cove*, 490 U.S. at 660-61. The issues of whether the Memorandum of Agreement served, in a significant way, the legitimate employment goals of Respondent and whether Respondent's stated reasons for agreeing to the Memorandum of Agreement were pretextual, were argued and put to the jury in this case, albeit under the theory of disparate treatment. The jury returned a verdict in favor of Respondent.

As this Court noted in *City of Jackson*, "[w]hile there may have been other reasonable ways for the [employer] to achieve its goals, the one selected was not unreasonable." *City of Jackson*, 125 S.Ct. at 1546. Here, Respondent, in conjunction with Petitioners' own Union, agreed upon a structure to make the Kentucky operation viable. This, as the jury found, was not based on age discrimination.

Petitioners, even if the theory were available under Kentucky law, cannot state a claim for recovery under a disparate impact theory based on *City of Jackson* and other decisions of this Court cited above.

CONCLUSION

For all of the foregoing reasons and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CIVIL APPEAL CONFERENCE STATEMENT

CA NO: 03-5870 CASE MANAGER:

Case Name: Charles Mayo Acree, et. al. v. Tysons Bearing Company, Inc.

District: Western Kentucky
Judge: Hon. Thomas Russell

Attorneys	Names	
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District Court Disposition

Judgment/Jury Verdict Damages Denied

Not a cross-appeal
Case has not bee [sic] previously before Court

Case will turn on issue of whether or not "intent" requirement in disparate treatment age discrimination claim under KRS chapter 344 (Kentucky equivalent of ADEA) may be said to exist as a matter of law based upon the facially discriminatory nature of a company policy. Also, does a claim of disparate impact exist where a company policy challenged by plaintiss [sic] has an exclusive impact upon older workers/

This case does not involve a conflict of law within this Circuit or among the Circuits.

Issues Proposed to be raised on Appeal:

See above: Defendant instituted a policy whereby it categorized all of its employees who were receiving any pensions benefits from their previous employer (from whom this Defendant had bought the factory where all of the Plaintiffs worked) as "new hires" under union contract. Non-Pensioners were not so categorized. "New hires" received $3.00 per hour less than other workers and had their vacation benefits reduced. All of the "new hires" had worked in their jobs for the previous owner of Defendant's facility for at least 15 years and had to have either 55 years of age or 30 years of service. The youngest among the group was 49 years of age. The "new hire" group consisted of approximately 70 employees, 50 of whom are plaintiffs in this case. Of the remaining approximately 80-140 employees of the Defendant (depending on employment levels after Defendant bought the plant where it employed the Plaintiffs on June 11, 1999), all but a very few who were hired by the original employer received $3.00 per hour more than the "new hires" for doing the same work, even though the "new hires" had been on their respective jobs, in almost every case, longer than their favored, younger, co-workers.

Plaintiffs believe they were entitled to summary judgment, a directed verdict, or JNOV post-trial, as the policy they attacked was as facially discriminatory as separate restrooms for whites and Blacks. They also believe that they should at least have had a jury instruction on a disparate impact theory.

Furthermore, despite a pre-trial ruleing [sic] that the Defendant could not attempt to shift responsibility for its policy to the Plaintiffs' union representatives, the Court

permitted testimony at trial that set up this very "defense," to the obvious prejudice of the Plaintiffs during the trial.

This is tho [sic] certify that a copy of this pre-conference statement was served on opposing counsel of record this 21st of July, 2003.

/s/ Philip C. Kimball

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No. 05-135

FILED
SEP 9 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CHARLES MAYO ACREE, TWYMAN K. APPLEBY, BRENDA BARTLEY, CHARLES BENNETT, DONALD BENNETT, LOUIS K. BENNETT, JR., AUSTIN BINGHAM, CARL BROWN, DONALD BRUTON, WILLIAM F. BURKS, JR., ISAAC BUTLER, JOYCE CAPPS, EDWARD CLAYWELL, NYMAN CLAYWELL, CHARLES COFFEY, BOBBY DECKARD, EVA ROSE DECKARD, KENNETH DOUGLAS, CHARLES EATON, ROBERT EMBERTON, JERRY FRANCIS, TED GARMON, WILLIAM GARRETT, CURTIS GIBSON, CARLOS GREEN, DANIEL HARPER, WILLIAM HOUCHENS, ROBERT JONES, RICHARD LILE, MAXIE MARTIN, WILLIAM MARTIN, THOMAS MATTHEWS, JOYCE MORGAN, MICKEL MUSE, RANDAL PACE, NOEL PAGE, GENE PEDIGO, CHARLES RICH, CLEVELAN ROACH, LYNDAL RUTLEDGE, RAYMOND SHAW, JR., SELBY SHIRLEY, JACK SHOOPMAN, NILE SMITH, JOE SPEAR, DOUGLAS STEEN, JACKIE SULLIVAN, DAVID TAYLOR, and BILLY YOUNG,

Petitioners,

v.

TYSON BEARING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The respondent has advanced several arguments in support of the proposition that the courts below correctly rejected petitioners' claims. These arguments, however, hardly merit that name. They are more aptly characterized as subtle, stealthy, suggestions. If directed to an extremely sympathetic reader, they may ever so slightly sway that reader to be somewhat less hostile to the respondent's obviously discriminatory conduct than he would otherwise be.

Petitioners will refer to respondent's efforts at persuasion as themes.

One of these themes is respondent's implicit characterization of its discriminatory conduct. According to respondent, if it discriminated in any manner against the "retiree-applicants," it did so only upon the basis that these individuals, " . . . had retired from SKF prior to the closing date," of SKF's sale of its tapered roller bearing facility to respondent. The respondent asserted that this distinguished the "retiree-applicants; from their co-workers because the latter group were, "active SKF employees" as of the "closing date" of SKF's sale of one part of its Glasgow facilities to respondent (brief in opposition, p. 4).

Respondent's suggested dichotomy is a weak effort to mask three facts. One fact is that the employment relationship with SKF of each and every member of both of respondent's suggested categories of employees was permanently and irrevocably severed by SKF as of the "closing date" of its sale of certain assets to respondent. Another fact is that the employment relationship with respondent of each and every member of both of respondent's suggested categories of employees began on the very

date of the sale. The third fact is that the "retiree-applicant's" status with SKF as retirees is but another way of describing their pension status with SKF.

As petitioners have previously stated, the "retiree-applicants'" pension status was analytically identical with their age over 46 years, thus making it a "proxy" for age discrimination under *Hazen Paper Company v. Biggins*, 507 U.S. 604, 613-614 (1993). Respondent has cited no authority for its implicit suggestion that the "retiree-applicants'" status as "retirees," as opposed to "pensioners" entitles it to a more favorable analysis than that set forth in *Hazen, Id.*

There is, of course, no such authority. Whether we focus upon the "retiree-applicants'" status as retirees or their status as pensioners the result is the same: respondent subjected them to a policy that was facially discriminatory against them because of their age, 46 years and over.

Respondent did not resort to euphemism when this case was before the district court. In its initial motion for summary judgment, it argued forthrightly that the *Hazen* opinion stood for the proposition that an employer who discriminated against its employees upon the basis of their pension status would, because of that fact, *never* be liable for age discrimination!

Respondent has apparently seen the error of its direct approach into the legal minefield awaiting it upon confronting the central issue of this case; hence its resort to a weak effort to divert attention away from the petitioner's pension status.

Respondent's next theme is that the petitioners' Union is responsible for respondent's discriminatory "retiree-applicant" policy. Of course, it dares not directly articulate this argument. Instead, it contents itself with repeatedly referring to the "retiree-applicant" policy as part of the "Collectively Bargained Agreement," along with several mentions of "negotiations" with the Union that produced, " . . . the very terms being challenged by petitioners." (brief in opposition, p. 2-3, 14).

The district court set forth the law of the case on the subject of the Union's responsibility for the "retiree-applicant" policy in its opinion of January 7, 2002 (appendix for the court of appeals, p. 101); it is that:

> . . . it is impossible for the union to have been "the primary efficient cause" of any discrimination arising from the Union-Tyson collective bargaining agreement. At best, the union shares fault with Tyson for the existence of the discriminatory scheme, but could not have been primarily responsible for it when Tyson also contractually bound itself to the collective bargaining agreement and, unlike the union, undertook to implement the agreement's terms.

In short, it does not really matter who thought up the "retiree-applicant" policy: the union or the respondent.

Indeed, it does not matter what even the respondent was thinking or even intended, when it adopted and enforced the policy.

The state of mind, motive, intent, or purpose of an employer who enforces a facially discriminatory policy is

completely irrelevant in a case such as this.* Any "intent" requirement is satisfied by the employer's enforcing a facially discriminatory policy; after all, such enforcement is certainly an "intentional" act!

Petitioners previously cited *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) for this proposition (petitioner's brief, p. 19). Perhaps some additional exposition is in order.

We may concede that Tyson's only "specific intent" in this case was to save money. We may believe that it harbored no "discriminatory animus" toward its older employees whatsoever. Indeed, it would be contrary to all of the laws of human nature if Tyson's top managers were hostile to its older workers, a large group of whom were saving it $3.00 per hour by coming to work every day while all but a handful of their co-workers earned that amount more than the "retiree-applicants." Because the "retiree-applicant" policy was discriminatory on its face it was an act of discrimination against those whom it affected; just as a municipality's banning individuals over the age of 40 years or African-American from its public swimming pools would be an act of discrimination requiring no inquiry whatsoever into the municipality's state of mind!

If the Court believes that there is some sort of "intent" or "motive" requirement even in cases such as this one, it could be satisfied by simply holding that an employer who adopts and enforces a facially discriminatory policy is

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* It may be relevant to a consideration of "liquidated damages" under the ADEA, *Trans World Airlines v. Thurston*, 469 U.S. 111, 126-133; such damages are not available under the Kentucky Civil Rights Act; nor are punitive damages.

conclusively presumed to harbor discriminatory animus or motive.

The respondent's third theme is that the petitioners received additional benefits that substantially offset the $3.00 per hour wage cut and the reduction in their vacation benefit that they suffered as a result of the "retiree-applicant" policy. Respondent relegated this particular theme to the same footnote to which the opinion of the court of appeals assigned it (brief in opposition, p. 2-3, footnote 2; opinion of the court of appeals, petitioners' brief, APX, p. 4-5, footnote 4).

In reality, there were, and are, no additional benefits exclusively for the "retiree-applicants," among the purported lists thereof in the respective footnotes cited above. Petitioners conclusively established this fact at pages 7-8 of their original brief in this case.

The respondent's fourth theme is that there is some sort of independent basis in Kentucky law that justifies the disposition of this case by the courts below.

Respondent cites Kentucky Revised statutes § 344.100 for the proposition that an age discrimination plaintiff must prove an "intention to discriminate" in order to prevail upon such a claim.

KRS § 344.100 applies *only*, by its express terms, where an employer can point to, " . . . a bona fide seniority or merit system."

There is no seniority or merit system at issue in this case; in fact, respondent specifically agreed to honor the seniority of *all* former SKF employees when it hired them. Obviously, all of the "retiree-applicants" had at least ten and as much as 30+ years of seniority with respondent and

seniority could not have formed the basis of any policy that deprived them of wages and benefits.

In addition to KRS § 344.100, respondent cites the case of *Harker v. Federal Land Bank of Louisville*, Ky., 697 S.W.2d 226, 229 (1984) for the proposition that, " . . . litigating a case under Kentucky law is [not] the same as litigating it under the ADEA," (brief in opposition, p. 9).

In *Harker*, *Id.*, the Kentucky Supreme court specifically noted that:

> The Kentucky age discrimination statute is specifically modeled after the Federal law [the ADEA]. Consequently, in this particular area, we must consider the way the Federal act has been interpreted.

The Court also noted that in age discrimination in employment cases, " . . . we must review the Kentucky statute and look for guidance in interpreting it to the Federal law," of employment discrimination, *Id.*

In *Harker*, the Court stated that it had to decide which of two federal court approaches to age discrimination cases it should adopt for deciding cases brought under the Kentucky Civil Rights Act, where the plaintiff relied upon circumstantial evidence. The Court adopted the approach then employed by the United States Court of Appeals for the Sixth Circuit. It characterized this approach as using:

> . . . a but/for test or the equivalent of a third stage pretext analysis without regard to whether or not the initial two stages of the *McDonnell-Douglas* test have been met. In the absence of specific evidence of age discrimination, a summary judgment is proper, *Rose v. NCR Corp.*, 703

F.2d 225 (6th Cir. 1983), *cert. den.*, ___ U.S. ___, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983).

Id. at 230.

Respondent has not disputed the fact that the courts below relied exclusively upon federal employment discrimination jurisprudence in deciding this case (opinion of the court of appeals, petitioner's brief, APX, p. 12; opinion of the district court, 12-30-02, petitioner's brief, APX, p. 37, note 3; opinion of the district court, 2-7-03; petitioners' brief, APX, p. 49). *Harker* stands for the proposition that they were correct to do so.

Respondent asserts that *Harker* requires that an age discrimination plaintiff, "... must establish 'cold hard facts' that age was a motivating factor in the complained of adverse employment action," in order to prevail (brief in opposition, p. 9).

What the court really said in *Harker*, *Id.*, at 229, was that:

> ... the special rule for age discrimination summary judgments is whether the plaintiff has proof of "'cold hard facts' creating an inference showing age discrimination was a determining factor" in the discharge.

Obviously, this standard is beside the point in the case at bar. This is because, again, the respondent's specific motive or intent is not an element of the petitioners' proof, which does not rely in any manner upon inferences. In turn, this is because of the facially discriminatory nature of the policy at issue.

Even if motive or inference were at issue in this case, it is hard to imagine any "colder" or "harder" facts creating

an inference showing age discrimination than an employer's enforcement of a facially discriminatory policy! Indeed, such a policy creates a *conclusive* inference of discrimination, if we even need an inference in our case.

As the courts below clearly understood, litigating this case under the Kentucky Civil Rights Act is identical for issues of liability to litigating a case under the ADEA.

Respondent's fifth theme is that the petitioners "waived" or abandoned their disparate impact theory of recovery. In support of this assertion, respondent cites the district court's pre-trial Order dismissing the petitioners' disparate impact claim (brief in opposition, p. 11). Even if the district court did, in fact, believe that the petitioners had "waived" this theory of recovery, the court of appeals obviously disagreed, as it spent four pages discussing the merits of the disparate impact theory (petitioners' brief, APX, p. 24-27).

It is true that the petitioners conceded that as federal case law stood prior to *Smith v. City of Jackson*, 544 U.S. ___, 125 S.Ct. 1536 (2005), they could rely only upon a "circumstantial model" of proof of disparate impact, as set forth in the case of *Gonzalez v. City of New Braufels*, 176 F.3d 384, 389 (5th Cir. 1999) [appendix for the court of appeals, p. 56].

The court of appeals opined that the petitioners argued:

> . . . that they have established a case of disparate treatment by virtue of a wage scale that had a disparate impact on older workers, (opinion of the court of appeals; petitioners' brief, APX, p. 27).

Even if this were correct, and the petitioners did not pursue a "pure" disparate impact theory of recovery, they should have been permitted to submit their "hybrid" or circumstantial disparate impact theory to the jury. They tendered an instruction incorporating this theory of recovery for submission to the jury; the district court refused to submit it (appendix for the court of appeals, p. 55-60).

Ironically, petitioners' proposed instruction on this issue virtually "tracks" the legal principles set forth in *Smith v. City of Jackson*, *supra*, as the respondent itself has outlined these principles at page 113 of its brief in opposition!

Petitioners' proposed instruction predicated a finding of liability under a circumstantial disparate impact theory upon the jury's believing from the evidence:

> That the policy of the Defendant described above [the "retiree-applicant" policy] had the effect of discriminating against the Plaintiffs and other "retiree-applicants" because of their age over 40 years and that the Defendant could have avoided the policy by instituting an across-the-board wage cut among all of its employees of substantially less than the pay cut to which it subjected the Plaintiffs and the other "retiree-applicants," (appendix for the court of appeals, p. 59-60).

It was clear error for the court of appeals to refuse to at least reconsider its opinion in light of *Smith v. City of Jackson*, as petitioners requested pursuant to FRAP 28(j) (petitioner's brief, APX, p. 67), and to reverse and remand this case for a new trial.

* * *

Basically, the opinion of the court of appeals stands as a stark and quite explicit denial of what should be, " . . . the unequivocal principle than an employer's facially discriminatory policy will in every instance and without more entitle an ADEA claimant to judgment as a matter of law," in the words of the court itself (opinion of the court of appeals, petitioners' brief, APX, p. 14-15). The court's justifications for denying this important principle are patently unpersuasive.

The respondent has asserted that, " . . . it cannot be seriously claimed that the court of appeals departed from the accepted and usual course of judicial proceedings," (brief in opposition, p. 6). Perhaps the respondent is as wrong on this point as it is on so many others. At any rate, the preservation of the principle that facial, overt, and obvious discrimination in employment should not be tolerated is clearly of sufficient importance to justify this court's exercise of its authority to grant a writ of certiorari.

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